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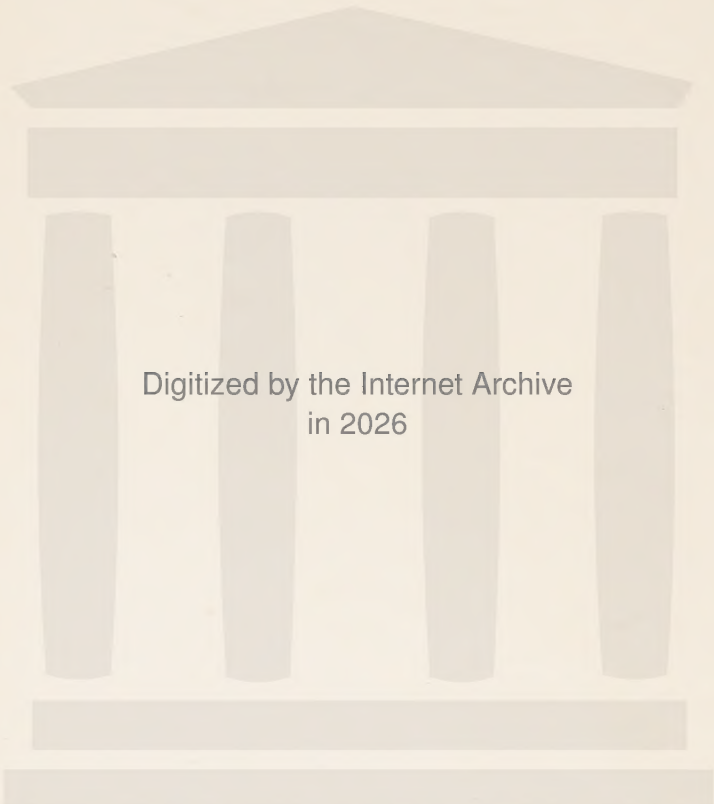
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THE CRIMINAL APPEAL REPORTS

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THE
CRIMINAL APPEAL REPORTS
1956

EDITED BY

T. R. FITZWALTER BUTLER

of the Inner Temple and Midland Circuit, Barrister-at-Law,
Recorder of Newark

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CORRIGENDUM

Mr. David Lloyd appeared for the appellant in *R.* v. *Jennings* (1956) 40 Cr.App.R. 147 and not Mr. Dennis Lloyd as stated at p. 148.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STABLE AND MR. JUSTICE ASHWORTH

CLARENCE WALTER WARD

1956
Jan. 11

Summing-up—Murder—Use of Violence to Child—Test of what Reasonable Man would have Contemplated.

The appellant was charged with the murder of a child aged 18 months, whose skull had been found to be fractured in two places. The medical evidence for the prosecution was that these fractures would have been insufficient to cause death, and that death was probably due to asphyxia. The appellant's case was that he had lost his temper with the child because she was continually crying, that he shook her with all his force and put her on a mattress, after which she dropped forward, apparently dead, but that he did not intend to kill her or hurt her, and that the only thought in his mind was to make her keep quiet. The judge directed the jury: "If, when he did the act which he did do, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child from what he did . . . he is guilty of murder. If, on the other hand, he could not, as a reasonable man, have contemplated that death would result in consequence of what he did, then he is guilty of manslaughter." It was contended for the appellant that the direction was wrong in that the test of "the reasonable man" should not have been introduced and that the jury should have been told to consider only what the appellant himself must have contemplated.

Held, that the direction given by the judge was proper and unexceptionable.

Appeal against conviction.

The appellant was convicted at Leeds Assizes on December 13, 1955, of murder and was sentenced by Pilcher J. to death.

The appellant was charged with the murder of an 18 months' old child, the daughter, by another man, of a woman with whom he was cohabiting. The appellant was admittedly a man of sub-normal intelligence. At the time of the child's death the appellant was alone in the house, the mother having been away for about fifteen minutes. The appellant and the

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CLARENCE WALTER WARD

Goddard L.C.J., Stable J., Ashworth J.

mother of the child afterwards buried its body on the edge of a slag heap, where it remained for about 20 months. When discovered, the body was in an advanced state of decomposition, but the skull was found to be fractured in two places. Medical witnesses called for the prosecution said that these fractures were not sufficient in themselves to cause death, and the theory put forward by one of them, Dr. Polson, was that something more had been done to the child and that its death was probably due to asphyxia. The appellant, in his evidence, said that the child was lying on a mattress, was continually crying and would not keep quiet; that he went up to her, picked her up, shook her in a fit of temper, and put her down again on the mattress, and that she dropped forward, apparently dead. He said that he had used his full force in shaking the child, that he did not want her to die and that he had no intention of killing her or hurting her, and that the only thought in his mind was to make her be quiet.

Pilcher J., in his summing-up, directed the jury: " If, when he did the act which he did do, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child from what he did, then, members of the jury, if you are satisfied about that, he is guilty of murder. If, on the other hand, he could not, as a reasonable man, have contemplated that death would result in consequence of what he did, then he is guilty of manslaughter. In law a man is presumed to intend the natural consequences of his act, and if he therefore acts in a fashion in which a reasonable man would contemplate that he would do serious injury to the child, a child of 18 months, and death results, then he is guilty of murder. But you have got to be satisfied about that and satisfied from the evidence so that you can say, ' We feel sure that this man must have contemplated in doing what he did that he would seriously injure this child,' and if you are satisfied about that, he is guilty of murder." He then invited the jury to consider " whether the accused, when he did what he did, must have contemplated that death or some serious injury would result from his act. If you are satisfied with that, you

will find him guilty of murder." After referring to the medical evidence the judge said: "If you are not satisfied that you feel quite certain that Dr. Polson's theory must be right, but are none the less satisfied that the accused man was offering this child such serious violence that he must have contemplated that he would kill it or injure it seriously, then even if you cannot dogmatise as to the exact fashion or as to the exact violence which was intended, you will be entitled to find him guilty of murder."

After the jury had considered their verdict for about three hours they sent the following note to the judge: "Your Lordship said in summing up 'if the members of the jury are not satisfied with Dr. Polson's evidence, but are satisfied that the accused man in offering serious violence . . .' Can the jury have the completion of this ruling?" Pilcher J. re-read to them a passage in the summing-up: "'If, when the person did the act which he did, he must as a reasonable being have contemplated that death or grievous bodily harm was likely to result, he was guilty of murder.' Now I have substituted 'serious injury' for 'grievous bodily harm,' so I will read it again. . . ."

Rudolph Lyons, Q.C. (*Edward Lyons* with him), for the appellant:

The judge misdirected the jury in telling them that the test to be applied in deciding whether the appellant was guilty of murder or manslaughter was what a "reasonable man" would have contemplated as likely to result from his act. The proper test was what the appellant himself would have contemplated, the subjective test. The objective test is appropriate only where a defence of provocation is raised, or when death has been caused in the course of a felony involving violence. There is no reported case which justifies the extension of that test to other cases. [He referred to Archbold's *Criminal Pleading and Practice*, 33rd ed. (1954), p. 929.] A similar direction to that given in the present case was given by Avory J. in LUMLEY (1911) 22 Cox 635 at p. 636, but that was a case where death had been caused in the course of a felony

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CLARENCE WALTER WARD

Goddard L.C.J., Stable J., Ashworth J.

involving violence. With that the words used by Humphreys J. in LARKIN (1942) 29 Cr.App.R. 18 at p. 23; [1943] K.B. 174 may be compared. The primary matter to be considered was what the accused man, with his peculiar mentality, contemplated. If the test of what a reasonable man would have thought was to be introduced at all, it should have been introduced merely as a guide, and not necessarily as the final guide.

G. Veale, Q.C., and *J. R. Cumming-Bruce* for the Crown were not called on to argue.

THE LORD CHIEF JUSTICE: The appellant was convicted at the last assizes for the West Riding of Yorkshire before Pilcher J. of the murder of an infant of 18 months, the child of a woman with whom he was living. The killing of the child took place at a time when the appellant was alone in the house with the child. Subsequently, with the assistance of the woman with whom he was living, he buried the dead body of the child in a slag heap and the body was not discovered till over a year after the death had taken place. It was then found that the child's skull had been fractured in two places. The body, of course, was in an advanced state of decomposition, but the skull was there until it was moved, but afterwards it disintegrated.

The medical evidence for the prosecution was that probably the fractures of the skull were not in themselves sufficient at the time to cause death, but the doctor's theory advanced before the jury was that something further was done to that child which must have caused death, the most probable cause being that she was asphyxiated. The appellant's case was that he was put into a state of violent temper because the child was crying, and he proceeded to shake it to such an extent that when he put its head on the bed it seemed to fall forward and thereupon it was apparently dead, having been killed through the shaking.

What was the cause of death was a matter for the jury. The learned judge in the earlier part of his summing-up said: "But if, when he did the act which he did do, he must as a reasonable man have contemplated that death or grievous

bodily harm was likely to result to the child as a result of what he did, then, members of the jury, if you are satisfied about that, he is guilty of murder. If, on the other hand, he could not, as a reasonable man, have contemplated that death would result in consequence of what he did, then he is guilty of manslaughter." I can only say that that seems to me to be an unimpeachable direction, and it is the direction which has been given to juries to one's own knowledge in scores of cases.

The jury were considering their verdict for a long time, and sent a note to the learned judge asking for a further direction, and the final direction given by the judge was: "If, when the prisoner did the act, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result, he is guilty of murder." The objection which Mr. Lyons takes to that is that it brings in the test of a reasonable man, and that the jury should have been asked to say whether the particular man knew. Of course, the test must be applied to all alike, and the only measure one can bring to bear in these matters is what a reasonable man would contemplate or would not contemplate. If the act is one with regard to which the jury can find that a reasonable man would say: "It would never occur to me that death or grievous bodily harm would result," then the jury can find the prisoner guilty of manslaughter; but if they come to the conclusion that any reasonable person, that is to say, a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm and that the child died of that grievous bodily harm, then a verdict of murder is justified and that does amount to murder in law.

In these circumstances the court cannot find any fault with the learned judge's summing-up. He gave the jury every opportunity of finding manslaughter if they thought fit, and the summing-up was eminently fair and correct. In these circumstances the appeal fails and is dismissed.

Appeal dismissed.

Solicitors: Hepworth & Chadwick, Leeds, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE STABLE

JOHN WILLIAM BRYANT (No. 2)

1955
Jan. 23

PRACTICE POINT

INDICTMENT FOR LARCENY

THE LORD CHIEF JUSTICE: Before we start the list today, I desire to refer briefly to the case of BRYANT, 39 Cr.App.R. 59; [1955] 1 W.L.R. 715, heard before the Courts-Martial Appeal Court on May 9, 1955, when Hallett and Byrne JJ. were sitting with me. We understand the decision has caused some difficulty to clerks to justices and those who have to prepare charges and indictments and we desire to give a short explanation of the decision, which we think will clear up any difficulty that may be felt.

The argument for the appellant in that case was that, as section 18 of the Army Act provided a special punishment for the stealing of military property, the accused could not be charged, as he was, with stealing contrary to section 2 of the Larceny Act, 1916. We pointed out that section 2 deals with punishment and does not create the offence of larceny, which is and always has been a crime at common law, though the punishment has varied from time to time. The effect of the section is that for any larceny for which no special punishment is provided the maximum sentence is 5 years' imprisonment. If then a person is charged merely with larceny, he cannot receive a heavier sentence, but if charged or indicted with larceny from the person or from a dwelling-house, to take two instances, he is liable to heavier punishment. We did not say, nor did we intend to say, that in civilian courts the addition of the words "contrary to section 2 of the Larceny Act" is

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Jan. 23

PRACTICE POINT (INDICTMENT FOR LARCENY)

Goddard L.C.J., Hilbery J., Stable J.

improper, though, if all that is intended is to charge a simple and not a compound or aggravated larceny, these words are in truth surplusage. That this was the opinion of that great authority on the criminal law, Sir James Fitzjames Stephen, is clear from page 147 of Volume III of his *History of the Criminal Law*, 10th ed., where he said that the expression "simple larceny," which first appeared in sections 2 and 4 of the Larceny Act of 1861, obscured those provisions and had no definite meaning. At the same time it is unobjectionable and indeed convenient to refer to section 2 where a charge of simple larceny is preferred, as it serves to direct the attention of the court to the fact that the charge is not one of compound or aggravated larceny and to the punishment which the offence charged carries. The reference to the section does not make the indictment bad, and equally if the indictment charged larceny contrary to the common law it would be good, but the sentence could not exceed 5 years even if the evidence disclosed a compound larceny. It is true that Schedule 1 of the Magistrates' Courts Act, 1952, which enumerates the indictable offences which can be tried summarily, refers among others to offences under section 2, but that must be taken to mean that a larceny for which no special punishment is provided is one of the offences which can be dealt with summarily. If then for the words in the penultimate sentence of the report "as it is proper to charge him in this country" are substituted "as he might have been charged in this country," we think that any difficulty or misunderstanding will be dispelled. I make this statement with the concurrence of Hallett and Byrne JJ., the members of the court who are sitting today, and Havers and Ashworth JJ., who would have been sitting if the court of five judges fixed for today had become effective.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE STABLE

1956
Jan. 23

NORMAN SAMUEL

Evidence—Cross-Examination of Prisoner on Previous Convictions —Character Put in Issue—Larceny by Finding—Evidence by Prisoner of having on Previous Occasions Restored Property Found—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *proviso* (*f*) (ii).

On a charge of larceny by finding, the prisoner stated in his evidence-in-chief that on two previous occasions he had restored property found by him. He was cross-examined on his previous convictions by counsel for the Crown.

Held, that the cross-examination was admissible under s. 1, proviso (*f*) (ii) of the Criminal Evidence Act, 1898, as the prisoner had put his character in issue.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on November 24, 1955, of larceny and was sentenced by the Deputy-Chairman (Henry Elam, Esq.) to 9 months' imprisonment. He was also convicted, on another indictment, of persistently importuning for immoral purposes, for which he was sentenced to 21 months' imprisonment (consecutive) and appealed against this conviction also, but this matter does not call for any report.

The appellant was charged with stealing a camera, which had been left by its owner, a young girl, in the grounds of the Natural History Museum. The camera had the girl's name on it. It was found 5 weeks later by the police in the appellant's house, and the appellant told the police that he had meant to hand it back. In his evidence-in-chief the appellant stated that on two previous occasions he had found property belonging to another person, and that on the first occasion he had handed

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NORMAN SAMUEL

Goddard L.C.J., Hilbery J., Stable J.

it to the superintendent of the hospital where he had found it and that on the second occasion he had handed it in at a police station. He was cross-examined by counsel for the prosecution on his previous convictions, the Deputy-Chairman having ruled that the appellant had put his character in issue.

R. N. Titheridge, for the appellant:

The cross-examination of the appellant on his previous convictions was inadmissible. The appellant had not put his character in issue by the evidence he gave in chief with regard to his previous dealings with property found by him. If the questions were such that they could not properly be put to the appellant by his counsel without letting in the appellant's character, the fault was that of his counsel, and the appellant should not be penalised for that. It was pointed out by Lord Simon in his speech in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr.App.R. 40 at p. 54; [1944] A.C. 315 at p. 326) that cross-examination on previous convictions should be directed only to destroying the prisoner's credibility and that the jury should not be asked to infer his guilt on the indictment which they are trying from those convictions, and, in any event, the judge should, in the exercise of his discretion, have declined to allow such cross-examination in the present case.

P. Crowder, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE [after stating that there were no grounds for interfering with the conviction for importuning]: In the other case the court have been assisted by a very well reasoned and well delivered argument by Mr. Titheridge, for which they are obliged. The point raised is one of those which so often arise—whether or not counsel for the prosecution was entitled to cross-examine the prisoner with regard to his previous convictions. The charge was that of stealing a camera, and the case against the appellant was that of stealing by finding. The camera had been left by a young girl in the grounds of the Natural History Museum, and it seems that the

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Goddard L.C.J., Hilbery J., Stable J.

appellant had found it some five weeks before it was discovered in his possession. It had her name on it, so that the appellant could have returned it to her or handed it to the police or to the attendant at the Natural History Museum and said: "If anybody wants it, here it is"; but he took it, and the question was: Did he steal it by finding? Of course, any reasonable man would know that it is theft if he appropriates to himself an article which he has found without making any attempt to discover the owner. Five weeks after this camera had been found, the police visited the place where the appellant was living, and there they saw the camera. He said: "I meant to hand it back." He had had it for five weeks, and I should not think any jury would be inclined to accept the story that he meant to hand it back. He said the reason why he did not hand it back was because he was on bail and had broken his bail, and he did not want the police to know where he was. He did not explain why he did not hand it to the porter and say: "If any child says she has lost her camera, here it is." I do not suppose any jury would have believed his story. It was a story which was, I should think, somewhat difficult to put forward with any degree of plausibility but for one thing, and that was that on two previous occasions the appellant said that he had found property and handed it over to the police. Of course, if a man has done that, it is an indication that he is an honest person. At the beginning of his examination-in-chief, Mr. Titheridge asked him: "Have you ever found on a previous occasion property belonging to another person? (A) Yes, Sir. (Q) When was the first time you ever found property belonging to somebody else? (A) In Dartford. (Q) Is that a hospital? (A) Yes, Sir. (Q) What did you find there? (A) £28. (Q) When was that? (A) In 1945. (Q) What did you do with that £28? (A) I handed it to the superintendent. (Q) Have you found other property? (A) Yes, Sir. (Q) What property was that? (A) I found a parcel in a 'phone box at the beginning of this year. (Q) What was in that parcel, do you know? (A) A pair of shoes, I believe. (Q) What did you do with that property? (A) Handed it to a policeman at the

Elephant and Castle. (Q) At the Elephant and Castle Police Station? (A) Yes."

What is the object of a man giving that evidence? Mr. Titheridge, with a chivalry which I do not think the case really calls upon him to exercise, has tried to take upon himself a fault in asking those questions because it may be, he says, his fault if it is held that those questions let in the appellant's bad character. But if he had not had some sort of point of that sort to put before the jury, what earthly chance would he have had? Here was a man who had found a little child's camera with her name on it, and kept it for five weeks. What inference could be drawn except that it was dishonestly acquired? In fact, even if we were in favour of Mr. Titheridge on these points, which we are not, I think we should have done the same as was done in STIRLAND *v.* D. P. P., 30 Cr.App.R. 40; [1944] A.C. 315, where the House of Lords found a point of law in favour of the prisoner but applied the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. It is too clear for argument. With all respect to the argument of Mr. Titheridge, who has said everything that can be said, the only object of those questions could be to induce the jury to say: "This man is one of those people who, if he finds property, gives it up; in other words, he is an honest man." That was obviously the purpose of the questions, and I certainly could not give any colour to the suggestion that all they mean is that the appellant is a man who, if he finds property, gives it up. The short answer to that is that if a prisoner puts his character in issue, he puts his whole character in issue, not such parts as may be convenient to him, leaving out the inconvenient parts. In the opinion of the court, it is clear that those questions did put the appellant's character in issue. He was asking the jury to assume that he was a man who dealt honestly with property which he found. Therefore, it was perfectly legitimate for counsel for the prosecution to put to him in cross-examination his previous convictions. That is what section 1, proviso (*f*) (ii) of the Criminal Evidence Act, 1898, permits.

Mr. Titheridge has relied on dicta in the House of Lords in

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Lord Simon's speech in the STIRLAND case (*supra*) in support of his contention that cross-examination on previous convictions is directed, and must be directed, only to destroying the prisoner's credibility and that the jury must not be asked to infer guilt from those convictions. It is very difficult to see how if it is permissible to cross-examine a prisoner with regard to convictions, for instance, if he is a thief and he is cross-examined on previous convictions of larceny, the jury is not, in effect, being asked to say: "The prisoner is just the sort of man who will commit these crimes and therefore it is highly probable he did." In theory, at any rate, what the jury is being asked to do is to reject the prisoner's evidence when he says: "I acted honestly in this case." The appellant's defence here was: "I always intended to hand back that camera to the police when I had a reasonable opportunity." By putting these questions to him the prosecution were in fact trying to destroy his credibility and to say to the jury: "It is all very well the prisoner saying that, but you are not obliged to believe him; look at his convictions, which show that he is not a person to be believed on his oath in these matters." I think the case comes down to the simple question: Did the appellant put his character in issue? In the opinion of the court, the learned Deputy-Chairman was fully justified in holding that he did put his character in issue, and therefore the cross-examination was legitimate.

This appeal fails and is dismissed. The sentence will date from conviction.

Appeal dismissed.

[IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL]

BEFORE

THE LORD CHIEF JUSTICE, LORD TUCKER AND LORD SOMERVELL OF HARROW

KARAMAT *v.* THE QUEEN

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Trial—View of Locus in Quo by Jury—Presence of Judge Desirable —No Objection to Attendance of Witnesses who have already Given Evidence—No Communication to be Made by Witnesses to Jury except to Give Demonstration—Absence of Prisoner.

If a view of the *locus in quo* were ordered at some stage of a criminal trial in England, it would be no objection to a witness attending and taking part that he had already given evidence. So long as the witnesses taking part were recalled to be cross-examined, if desired, the prisoner would not be in any way prejudiced, but it would be essential that every effort should be made to see that witnesses made no communication to the jury except to give a demonstration. It would be eminently desirable for the judge to be present. If the prisoner declined to attend the view and was allowed by the court to be absent, he could not afterwards raise the objection that his absence made the trial illegal.

MARTIN & WEBB (1872) L.R. 1 C.C.R. 378 considered.

Appeal from the judgment of the Court of Criminal Appeal in the Supreme Court of British Guiana, which on February 24, 1955, dismissed the appellant's appeal from a conviction of murder. The trial took place before Hughes J. and a jury on September 16, 1954, at the Criminal Sessions for the County of Demerara.

The appellant was indicted with five other persons, all of whom were acquitted, of the murder of Haniff Jhanar, who occupied land adjoining that on which the appellant and members of his family and other relations lived and farmed. There had been frequent disputes between the occupants of the

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two estates arising out of cattle trespass, and undoubtedly there was much ill-feeling between them. There was a series of quarrels during September 26 and the early part of September 27, 1953, and after a fight in the morning of the latter day it was alleged by the Crown that the appellant obtained a 12-bore gun and two cartridges. Later in the day, when the deceased man with others approached a cow pen, the appellant, who was engaged in milking, shot at Haniff and killed him and also shot and killed Haniff's mother. The appellant's substantial defence was that he had shot in self-defence. His co-prisoners rested their case on an alibi.

Before the end of the case for the Crown, there was a view of the *locus in quo* by the jury, which the appellant did not attend. The facts relating to the view are set out fully in the judgment.

Bernard Gillis, Q.C. and *John Lloyd-Eley* for the appellant.

J. G. Le Quesne for the Crown.

Dec. 14, 1955. At the conclusion of the arguments the Lord Chief Justice announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons later.

Jan. 24, 1956. The reasons for the decision of the Board were given by

THE LORD CHIEF JUSTICE: This was an appeal, by special leave, from a judgment of the Court of Criminal Appeal in British Guiana, dismissing the appellant's appeal against a conviction for murder after a trial before Hughes J. and a jury which, their Lordships were told, lasted some 14 days. At the close of the argument their Lordships announced that they would humbly advise Her Majesty to dismiss the appeal and now give their reasons for the advice which they tendered.

[His Lordship stated the facts and continued:] The case involved the calling of a large number of witnesses. Many, if

not all of them other than the police, were, as is evident from the transcript of their evidence, illiterate and of low intelligence with a very poor command of the English language, a class, no doubt, with whom the judges in the Colony are quite accustomed to deal in their courts. It is unnecessary for their Lordships to deal with the evidence in any detail, because the case before the Board was in substance confined to one matter relating to a view which took place during the hearing. Suffice it to say that not only were there numerous witnesses, but a good deal depended on the locality of the crime and where the various witnesses were at the times to which they spoke in their evidence. During the course of the trial, and before the case for the prosecution was finally closed, all counsel concerned applied to the judge to direct a view of the locality. It is quite clear from the record for what purpose a view was desired and the reason why the judge granted the application. It was so that the witnesses might indicate to the jury the positions at which they alleged they were at the material times and the direction from which others approached the scene of the shooting, and to test the opportunity afforded for identification. The Criminal Law (Procedure) Ordinance of British Guiana provides that the judge, if he considers it to be in the interest of justice, may direct that the jury have a view of any place, person, or thing connected with the case upon the terms and conditions which seem to him proper. It is also provided that the practice and procedure in criminal trials, including the practice and procedure relating to juries, should conform as nearly as possible to that which obtains in England. When counsel applied for a view, counsel for the present appellant and counsel appearing for two of the other prisoners submitted that none of the witnesses who had already given evidence should be allowed to attend the view or to indicate any of the points referred to in their evidence. Counsel for two other of the prisoners did not join in this objection, and it was disallowed by the judge. He asked the jury to indicate which of the witnesses they desired to attend and indicate positions, and stated that counsel would have full opportunity to recall

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and cross-examine any witness on any matter arising from the view. The jury did intimate the witnesses whom they desired should be present, and the judge said that the defence might wish some of their witnesses to attend to point out particular places, though they had not yet been called. He gave no direction that they were to attend; he only gave them permission to do so if the defence desired it. Thereupon the appellant's counsel declined to take any part in the view or cross-examine any of the witnesses who attended, and he informed the court that his client would not attend. The counsel did himself go to the view as the appellant's representative, but took no active part in the proceedings there nor did he subsequently cross-examine any of the witnesses when they were recalled after the view was held.

The first submission on behalf of the appellant is that a "view" ceases to be a view and is not authorised by the Ordinance if witnesses attend and indicate places by pointing or by words. Their Lordships do not accept this submission. In their opinion, the judge was perfectly right in deciding that witnesses who had given evidence could attend at the view. In fact there is every reason why they should, and it was just those witnesses from whom the jury would desire to get ocular demonstration of their positions at the material times. It would or, at least, might enable the jury to understand the evidence they had given. As the Chief Justice pointed out in giving the judgment of the Court of Criminal Appeal, the average witness in the Colony is not as capable of giving intelligible descriptions of places as, generally speaking, are witnesses in the English courts. As already pointed out, these witnesses were illiterate, and no doubt would have difficulty in explaining themselves and probably considerable difficulty in following a plan, a difficulty often experienced with witnesses in this country if in a humble station of life. To have held a view in their absence would have destroyed its whole value, for it could not be demonstrated to the jury just what they wanted to know.

If a view were ordered at some stage of a criminal trial in

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England, their Lordships are of opinion that it would be no objection to a witness attending and taking part that he had already given evidence. It might well be that it was for that very reason that a view would be reliable. For instance, the evidence of a police constable or other witness who might testify that he was keeping watch on a certain place and saw an incident might be challenged on the ground that from the place where he was concealed he could not possibly have seen what he said he had. It might be of the utmost value then to let the jury see the place with the witness in the position to which he had spoken; he might well be able to demonstrate that, while a shorter man would not have been able to see the incident or a taller man might have been exposed to view, he could, though concealed, have seen what he said he did. If a witness at the view put himself in a position different from that which he described in his previous evidence, that would naturally expose him both to cross-examination and comment, but, as the Court of Criminal Appeal observed, this would go to the weight, but not to the admissibility, of his evidence. In MARTIN & WEBB (1872) L.R. 1 C.C.R. 378 a view was directed and two constables went to it to point out where they stood when observing the acts complained of by them. The court did not quash the conviction, but would not go into the question of whether questions were asked of the witnesses in the absence of the judge and the prisoners, as there had been no inquiry into this below. Their Lordships are of opinion that witnesses who had already given evidence took part in the view in the sense of placing themselves in the positions in which they said they had been at the material times or indicating the positions of others and that this was unobjectionable. That ground of appeal, therefore, fails.

It is now necessary to deal with what took place at the view. When giving special leave to appeal, their Lordships asked to be supplied with an agreed statement of what took place at the view, and one prepared by the respective counsel engaged has been before them. A marshal and constables having been sworn to keep the jury, the jury were taken in motor-cars to

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the scene of the shooting, where they were joined by the judge, counsel and court officers. At their destination the jury were checked by the marshal and were also checked at any other place where they stopped during the day. Any juror who wanted to ask a question put it through the judge, and the witness gave a demonstration as the answer, and counsel were invited by the judge to put questions through him, but no cross-examination was allowed. Owing to the nature of the locality, at some points small boats had to be used to cross or get along trenches and cuts, and at some points it was inevitable that jurors, counsel and witnesses got into the same boat or had to walk together along a dam, but no witnesses were then asked to show anything. It seems that on one occasion a juror and a witness were in the same boat as one of the counsel for some of the accused, who has stated that there was no conversation relating to the case. It is to be specially noticed that the judge was present the whole time so that he could observe and control the proceedings.

That a view is part of the evidence is, in their Lordships' opinion, clear. It is in substitution for or supplemental to plans, photographs and the like. In such a view as took place here and for the purpose for which it was held there can, in their Lordships' opinion, be no objection to the judge asking a witness to place himself at a particular spot which he has mentioned in his evidence or to show to the jury the place where someone else stood or the direction from which someone came. There is nothing to show that any more than this took place. The Chief Justice in the Court of Criminal Appeal observed that in the Colony views are far more frequent than in England, for the reasons that have been mentioned above, and the judges of that court, who are doubtless thoroughly accustomed to this procedure, saw nothing wrong in it, nor does this Board. So long as the witnesses taking part are recalled to be cross-examined, if desired, their Lordships are unable to see that the accused person is in any way prejudiced, but they would observe that it is essential that every effort should be made to see that the witnesses make no

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communication to the jury except to give a demonstration. In MARTIN & WEBB (*supra*) it is clear from the report that neither the judge nor the prisoner attended the view, which was held after the summing-up. The court said that there was no irregularity in allowing such a view, though such precautions as may seem to the court necessary ought to be taken to secure that the jury should not improperly receive evidence out of court. Here everything was done in the presence of the judge, who throughout was in control of the proceedings. It was eminently desirable that he should be present, and it is possible that, had he not been, a different result would have followed.

It was, however, strenuously argued before this Board that, as the accused was not present, this is a fatal objection. A short answer to this point was made by Mr. Le Quesne for the Crown, who pointed out that under the Criminal Procedure Ordinance it is competent for the court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in and therefore part of the trial, and as the court, on being informed that the accused did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent. But, in addition to this, their Lordships desire to say that, if an accused person declines to attend a view which the court thinks desirable in the interests of justice, he cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction, if one follows, though he could, of course, object if any evidence were given outside the scope of the view as ordered. The appellant had the opportunity of attending and declined it. Their Lordships would further observe that the absence of the accused was not made a ground of appeal to the Court of Criminal Appeal and does not appear to have been raised at all in that court.

[His Lordship then dealt with a further ground of appeal which does not call for report and concluded:] On all grounds, therefore, this appeal fails.

Solicitors: Hy. S. L. Polak & Co. for the appellant; Charles Russell & Co. for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE STABLE

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MOYNES *v.* COOPPER

Larceny—Mistake—Wages Packet Handed to Prisoner Containing Sum in Excess of that Due—Prisoner at Time Unaware of Mistake—Discovery by Prisoner of Mistake when Packet Opened—Dishonest Decision then to Appropriate Contents—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 1 (2) (i) (*c*).

The defendant, a clerk, received through a mistake of his employers, a wages packet containing a sum substantially in excess of that due to him. At the time of receiving the packet the defendant was unaware of the mistake, but discovered it later in the day and then dishonestly decided to appropriate the contents.

Held (Stable J. dissenting), that the defendant was not guilty of larceny of the amount of money in excess of that to which he was entitled, as, to constitute a " taking " within the meaning of section 1 (2) (i) (*c*) of the Larceny Act, 1916, there must be an *animus furandi* at the time when the defendant takes the property and in the present case there was no *animus furandi* at that time as the defendant did not then know what was in the packet.

MIDDLETON (1873) L.R. 2 C.C.R. 38 followed and applied.
HUDSON, 29 Cr.App.R. 65; [1943] K.B. 458 referred to.

Case stated by the Appeal Committee of West Kent Quarter Sessions.

On June 13, 1955, on an information preferred by Coopper, a police officer (" the prosecutor "), George William Moynes (" the defendant ") was convicted at West Malling Magistrates' Court of the larceny of £6 19s. 6½d., the moneys of his employers. The defendant appealed to West Kent Quarter

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Sessions, who, on August 5, 1955, allowed the appeal and quashed the conviction.

The following facts were found by the Appeal Committee. On April 29, 1955, the defendant, who was employed on a military site, asked his employers' representative on the site for an advance of wages which would become due to him on May 2. The request was granted, and the defendant was paid £6 19s. 6½d. on account. On April 29 the wages clerk made up the pay packets and, either in ignorance that an advance had been made to the defendant or by forgetfulness, put the full weekly wage of £7 3s. 4d. into the defendant's packet and handed it to him on May 2. When he received the packet the defendant did not know that it contained more than was due to him. He opened it later in the day and then for the first time discovered the amount it contained. He then dishonestly decided to appropriate the contents and did so, so that he kept for his own use £6 19s. 6½d. more than that to which he was entitled.

The prosecutor appealed to the Divisional Court.

Edward Gardner for the prosecutor.

The defendant did not appear and was not represented.

Cur. adv. vult.

THE LORD CHIEF JUSTICE: The judgment I am about to read is that of Hilbery J. and myself.

This is a Special Case stated, with admirable brevity and clarity, by the Appeal Committee of the West Kent Quarter Sessions, who allowed an appeal by the respondent against his conviction by a magistrates' court for the larceny of money, the property of his employers.

The facts found by the Committee are that on April 29, 1955, the respondent, who was a workman on a military site, asked his employers' representative on the site for an advance of wages which would become due to him on May 2. This request was granted and he was paid £6 19s. 6½d. on account.

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The full amount which would have been due to him on May 2 was £7 3s. 4d., so all that he ought to have received on that day was 3s. 9½d. On April 29 the wages clerk made up the pay packets and, either in ignorance that an advance had been made to the respondent or by forgetfulness, it matters not which, he put the full amount of £7 3s. 4d. into the respondent's packet and handed it to him on May 2. The Committee have found that when he received the packet the respondent did not know it contained this sum, and we must assume from their finding that the respondent did not know that his packet contained more than was due to him. He opened the packet later in the day and then for the first time discovered the amount it contained. He then dishonestly decided to appropriate the contents and did so, so that he kept for his own use £6 19s. 6½d. more than that to which he was entitled. The question is whether that amounts in law to larceny. The problem whether dishonest appropriation in cases where money has been paid under a mistake amounts to larceny has been the subject of many cases and much difference of judicial opinion. The Committee were of opinion that this case is indistinguishable from PRINCE (1868) L.R. 1 C.C.R. 150. In that case the cashier of a bank, who had authority to pay cheques, was deceived by the presentation of a forged cheque by the prisoner. He paid the amount of the cheque and the prisoner was indicted for stealing the proceeds. It was held that this did not amount to larceny. Blackburn J. lamenting, as we also may, that this was the law, said (at p. 155): "if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny." It was held in that case that the prisoner's offence amounted to obtaining the money by false pretence, but in the present case no question of false pretences arises as the respondent made no representation of any sort.

The next case which bears on the subject is MIDDLETON (1873) L.R. 2 C.C.R. 38, and in 1885 there came the much discussed case of ASHWELL (1885) 16 Q.B.D. 190, in which

unfortunately the court was equally divided. We do not propose to discuss these or any subsequent cases on the subject in detail, because, in our opinion, the matter is now concluded by section 1 (2) of the Larceny Act, 1916. It will be remembered that there have been in the last 90 years two codifications of the law of larceny. The first was the Larceny Act, 1861 (24 & 25 Vict. c. 96), the long title of which is: "An Act to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences." While that Act in section 1 defined a considerable number of terms, such as "document of title" and "valuable security" among others, it did not contain a definition of larceny or any of the necessary constituents of that crime. The Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), which is now the governing statute, is entitled: "An Act to consolidate and simplify the law relating to larceny triable on indictment and kindred offences," and does contain an elaborate definition of larceny. This Act was not intended to alter the law and, as has often been said, it has not done so; but while the Act of 1861 consolidated, and to some extent amended, the statute law, the later Act consolidates and simplifies the whole law, which includes the common law as expounded by judicial decision. What amounts to a "taking" sufficient to amount to larceny was much discussed in MIDDLETON (*supra*), and in our opinion it is the effect of that decision which is reproduced and enacted as the law. Section 1 (2) (i) (*c*) of the Act provides: "the expression 'takes' includes obtaining possession under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained." This, in our opinion, is affirming the common law that the taker must have *animus furandi* at the time when he takes the property. In MIDDLETON'S case (*supra*) the wrong amount of money was paid by the Post Office clerk before the prisoner picked it up, knowing of the clerk's mistake, and so took it *animo furandi*. In the present case it is found that the respondent did not know of the mistake when he took the money, so the taking was not *animo furandi*. We prefer to base our decision on this ground, namely, that there was no

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taking here within the section. The decision in PRINCE (*supra*) depended on the fact that the bank, acting through its authorised clerk, did intend to pass the property in the money, though it was induced to do so not by its own or his mistake, but by fraud. Where a transfer of property is obtained by fraud, there is no doubt but that the property does pass, subject, however, to the right of the defrauded party on discovering the fraud to disaffirm the transaction and resume his property. In the present case the action would be for money had and received to the company's use as paid under a mistake of fact.

For these reasons, while the respondent was guilty of grave dishonesty, in our opinion he was not guilty of larceny and in the present state of the law he was not guilty of any criminal offence.

Before parting with the case, we ought to refer to HUDSON, 29 Cr.App.R. 65; [1943] K.B. 458, on which the prosecution placed reliance. That case has been the subject of a good deal of criticism, see for instance Russell on *Crimes*, 10th ed., pp. 1158–1161, as to whether the charge ought not to have been for obtaining an altered cheque by false pretences; the appellant had certainly been guilty of some crime. He was charged with stealing a cheque which had come to him by post and was intended for another person of a similar surname, but there was no initial either on the envelope or cheque. The accused, knowing that the cheque was not intended for him, got the drawer to insert his initial on the cheque, which he kept and cashed. This would seem to be closely akin to stealing by finding, as when he found the cheque in the envelope he could easily have discovered the true owner. But in our opinion it is not an authority for the present case, as in HUDSON's case (*supra*) neither the cheque nor the envelope was intended by the sender for the accused. Here there is no doubt that the pay packet was intended for the respondent and was so delivered to him.

The appeal is dismissed.

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STABLE J.: On June 13, 1955, the respondent was convicted by the Magistrates' Court sitting at West Malling for having, on May 2, 1955, stolen £6 19s. 6½d., the property of a limited company, M. J. Gleeson (Contractors), Ltd., by which he was employed. He appealed against this conviction to the West Kent Appeal Committee, who heard the appeal on August 5, 1955, and quashed the conviction.

The facts, which are fully and clearly set out in the Case Stated to this court, may be summarised as follows. At the material time the respondent was employed by Gleeson's at a net wage of £7 3s. 4d. On April 29, the respondent, in response to his application to Gleeson's agent on the site where he, the respondent, was working, received the sum of £6 19s. 6½d. as an advance on his week's wages. On the same day Gleeson's wages clerk in the performance of his duty put £7 3s. 4d. into a wages packet to be handed to the respondent on pay day. Whether this was done before or after the respondent had received his advance we do not know nor does it matter, as the pay clerk was not aware of this advance payment and put the money into the envelope in the belief that the respondent would be entitled to be paid his full wage when pay day came. On May 2, 1955, the wages clerk, still thinking that the full amount of the week's wages was due and payable to the respondent, handed the pay packet to him, who took it, honestly believing that it only contained the sum of 3s. 9½d., which was the amount of his weekly wage then outstanding. From this it is clear that the actual handing over and receipt of the pay packet was the result not of a mutual mistake but of two separate mistakes. There are few words in the English language susceptible to more meanings and subject to not infrequent misuse than the word "mistake." To take but three examples, which are far from being exhaustive, A shoots at a pigeon and kills a crow "by mistake": A shoots at a crow believing it to be a pigeon and kills it "by mistake": A, not intending to fire his gun, lets the gun off "by mistake." In the first case the mistake was simply a bad shot, in the second a failure to distinguish a crow from a pigeon, and in the third

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case gross carelessness. In the present case the "mistake" was twofold: In the case of the wages clerk it consisted of, or arose from, his ignorance that the respondent had received a substantial advance on account of his wages: in the case of the respondent his erroneous belief that the packet contained the sum to which he was entitled, namely, 3s. 9½d. and no more.

To return to the facts, the respondent, on arriving home with his pay packet on the same day that he received it, opened it and then discovered for the first time that it contained a sum of £6 19s. 6½d. in excess of what he was entitled to, whereupon he dishonestly decided to, and did, misappropriate that sum to his own use. It was for this he was convicted of larceny.

The grounds on which it was contended on behalf of the respondent before the Appeal Committee that he could not be convicted of larceny were two, namely (1) that the pay packet having been handed over to him by the employer or his duly authorised agent intending to pass the possession and property in its contents to him, no subsequent misuse of the money by him could in law be larceny, and (2) that to constitute the offence of larceny the taking and the *animus furandi*, the dishonest intent, must be contemporaneous. These two grounds are, in my judgment, wholly separate and distinct and are considered separately.

As regards the first of the two grounds, the Appeal Committee held that they were bound by the case of PRINCE (1868) L.R. 1 C.C.R. 150. The facts of that case were very different from those now under consideration, but there can be no doubt that if in the present case the respondent had obtained his pay packet by falsely and fraudulently telling the wages clerk that he had not received any advance on account of wages but was entitled to be paid the full amount, that case is a clear authority that he should have been indicted for false pretences and, if indicted for larceny, could not properly have been convicted. In the light of the later authorities to which I am about to refer PRINCE (*supra*), though it goes a long way in the respondent's favour, is not, in my judgment, decisive of the present case.

The decision which, in my opinion, disposes of the first point is MIDDLETON (1873) L.R. 2 C.C.R. 38, where PRINCE (*supra*) was among the authorities considered. The facts were shortly as follows: The accused applied at a Post Office for payment of a sum of 10s. 0d. to which he was entitled. The clerk in error referred to the wrong advice note, which authorised a payment of £8 16s. 10d. to someone else, placed that sum on the counter for the accused who, knowing that he was not entitled to it, dishonestly picked it up and went off with it. The court, by a majority of 11 to 4, held that he was properly convicted of larceny. A close perusal of the judgments shows that even where two or more of the judges reached the same conclusion, their process of reasoning and the grounds on which their conclusions were based were not invariably identical. The distinction between that case and this, namely, that in the MIDDLETON case (*supra*) the *animus furandi* was contemporaneous with the handing over the money, is for the point now under immediate consideration, in my judgment, immaterial. The relevance of the authority to the present case is the decision that in certain circumstances consent given in error and under a misapprehension of the true facts is not a consent of the true owner. It seems that the decision of the majority of the court was partly based on the fact that the Post Office servant was not the owner of the money and only had a qualified authority to dispose of it, but the wages clerk in the present case was, in my judgment, in an identical situation; he was not the owner of the money and his only authority was to pay over the correct amount of wages, no more and no less. In this context I would refer to the dissenting judgment of Brett J., as he then was, at pages 64 and 65, where he clearly indicates his view that the decision did not turn on the fact that the money was handed over by a clerk and not by the Postmaster-General in person. In my judgment, the decision in MIDDLETON'S case (*supra*) disposes of the contention that the employers consented to the present transaction.

Turning to the second ground, in my judgment, the decision of the Appeal Committee was erroneous for two reasons,

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namely, that on the facts proved the *animus furandi* was contemporaneous with the taking and, secondly, even if it was not, having regard to the fact that when he received the pay packet the respondent did not know that the packet contained the sum of money to which he had no legal or equitable right, the time lag between his first getting possession of the pay packet and the *animus furandi* is immaterial. Inevitably in human affairs events occur in a time sequence, and even if the respondent had opened his pay packet in the hut or office, or wherever it was that he received payment, some time must have elapsed between the actual possession of the packet and his discovery of its contents. Since, when he got home on the same day immediately on opening the packet he formed the felonious intent, in my judgment the whole sequence should be regarded as one transaction and the taking and the *animus furandi* contemporaneous, see ASHWELL (1885) 16 Q.B.D. 190, *per* Stephen J. at p. 216, where he says: "If a man finds a purse, picks it up, opens it, finds money in it and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law." This passage was referred to and approved in HUDSON, 29 Cr.App.R. 65, at p. 70; [1943] 1 K.B. 458 at p. 461. Applying that passage to the present case, at the moment when the respondent discovered that this pay packet contained a sum of money to which he knew he had no right, he misappropriated it and was consequently, in my judgment, then and there guilty of larceny. If the respondent immediately on being handed the envelope had opened it and on discovering that it contained money he was not entitled to, had decided to misappropriate it, on the authority of MIDDLETON (*supra*) he would have been guilty of larceny, and I cannot see that the fact that he postponed opening the envelope till he got home—a perfectly normal course to pursue—can affect the legal position. Assuming, however, that that view is wrong and that the whole process ought not to be regarded as one action taking place at one time, the question still remains whether the taking of the

money was complete when the envelope containing it was handed to the respondent or whether the real taking was when on opening the envelope he discovered for the first time what it really contained.

In RILEY (1853) 6 Cox 68, a farmer inadvertently and innocently drove off a lamb that did not belong to him in a flock of twenty-nine of his own lambs. When he came to sell his lambs, he discovered for the first time the presence of the stranger in the flock and dishonestly sold it as his own. He was convicted at quarter sessions of larceny of the one lamb, and the conviction was upheld by a court consisting of Pollock C.B., Parke B. and Williams, Talfourd and Crompton JJ. Pollock C.B. decided the case on the grounds that either until the discovery of the "stranger" there was no taking, or if there was an antecedent taking it was, though inadvertent, unlawful. Parke B. rested his judgment on the second ground only, namely, that the original taking was a trespass. In my judgment, this case is a strong authority in favour of the appellant. Both in the case of the flock of sheep and the pay envelope the accused man honestly took away something which he did not know was there, and therefore in relation to which he was then incapable of forming an intention, honest or otherwise. Whatever the appropriate form of action might be, the accused in the case of the lamb had no legal right to it. In the present case, in the light of the true facts, which is the light in which legal rights are ascertained, neither had the respondent any right to the money which he misappropriated.

In his judgment in ASHWELL (*supra*), at p. 225, Lord Coleridge says: "In good sense it seems to me he did not take it till he knew what he had got, that same instant he stole it." This passage is cited with approval in the judgment of the court in HUDSON, 29 Cr.App.R. 65 at p. 71; [1943] 1 K.B. 458 at p. 462, where this passage appears: "That is what the appellant did in this case. As soon as he saw what he had got, he made up his mind to steal it." Lord Coleridge discusses the case of RILEY (*supra*) in his judgment in ASHWELL at p. 226, where he expresses the view that the result would have been the same if

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the owner of the lamb had been present when it was driven off. The point may be stated in another form, namely, that as the taking is a necessary ingredient in the crime of larceny and is governed by the word "fraudulently," that must connote that there cannot be a taking within the section unless the taker knows what he is taking or at least whether what he is taking belongs to him or not. Put more shortly, the taking must be an act of the mind as well as of the hand.

The case of RILEY (*supra*) does not touch on the first point raised by the respondent on the subject of consent, as on the facts that question did not arise.

The case of RUSE *v.* READ, 33 Cr.App.R. 67; [1949] 1 K.B. 377, a case where the original taking though not felonious was a trespass, reaffirmed the validity of the decision in RILEY'S case (*supra*), but it is also to be observed that the decision in HUDSON (*supra*) was referred to with approval.

Notwithstanding the meticulous care which the Appeal Committee applied to the hearing of the appeal and the preparation of this case, both on principle and in accordance with the authorities, in my judgment, for the reasons stated above they were wrong to quash the conviction.

It would seem a strange anomaly that if the wages clerk had inadvertently dropped the envelope and its contents and the appellant had chanced to find it and on picking it up and finding what was inside misappropriated the money he would have been guilty of larceny, but on the present facts, having been equally dishonest, gets off scot free.

Appeal dismissed.

Solicitors: Sharpe, Pritchard & Co., for R. P. Tunstall, Maidstone, for the prosecutor.

BEFORE

THE LORD CHIEF JUSTICE AND MR. JUSTICE BYRNE

PRACTICE NOTE

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COMMITTALS AND APPEALS TO QUARTER SESSIONS

THE LORD CHIEF JUSTICE: The Society of Chairmen and Deputy Chairmen of Quarter Sessions has called our attention to the diversity of practice which obtains among clerks to justices with regard to what should be sent by them to quarter sessions when there is an appeal from a magistrates' court and when the latter commit a prisoner for sentence under section 29 of the Criminal Justice Act, 1948, or for Borstal training under section 20. While this Court has no power to give directions on the matter, as it is obviously desirable there should be uniformity in practice, we think we may properly express an opinion in the hope that it will be generally followed. In the case of commital for sentence or Borstal training it is really essential that all the information that was before the committing justices should be before the Appeal Committee of Quarter Sessions and, accordingly, any notes of evidence taken by the clerk and any documents put in at the hearing should be sent, as no doubt they generally are. Our opinion on this matter was we think made clear in R. *v.* DORSET QUARTER SESSIONS, *ex p.* O'BRIEN [1956] 2 W.L.R. 682n.

As to appeals the case of R. *v.* RECORDER OF GRIMSBY, *ex p.* FULLER [1955] 3 W.L.R. 563 has caused some difficulty. All that we meant was that it was undesirable that, while trying an appeal, the justices should always have the notes taken below before them unless it became necessary to see what a witness had said or what had transpired in the court below. But we had not in mind that it may often be necessary for the

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chairman to have access to the notes before the hearing to enable him to decide an application for legal aid, to estimate the length of an appeal when he is settling the day's list and perhaps for other matters. This had, in effect, been said in the DORSET case (*supra*). We hope, therefore, that clerks to justices will send their notes to the Clerk of the Peace when there is an appeal, so that he can show them to the Chairman or Recorder, if he requires them, before the hearing for such purposes as those we have mentioned, and also give them to the court during the hearing if it becomes necessary or desirable for them to see what happened below.

Ormerod and Glyn-Jones JJ., who sat with me in the GRIMSBY case (*supra*), agree with what I have just said, as does my brother Byrne who is sitting with me today.

[CENTRAL CRIMINAL COURT]

BEFORE

JUDGE MAUDE

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R. *v.* SILVER AND OTHERS

Prostitution—Living Wholly or in Part on Earnings—Flats Let by Landlords or Agents to Persons Known to be Prostitutes—Whether Offence Committed—Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *s.* 1, *as amended by Criminal Law Amendment Act*, 1912 (2 & 3 *Geo.* 5, *c.* 20), *s.* 7 (5).

The defendants, some of whom were landlords and others estate agents, let or were concerned in the letting of flats at high rents, each to one prostitute, knowing that she was a prostitute and that she intended to use the flat for the purposes of prostitution. They were charged with knowingly living wholly or in part on the earnings of prostitution, contrary to section 1 of the Vagrancy Act, 1898, as amended, and in the case of one defendant, with aiding and abetting that offence.

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Held, that none of the defendants was guilty of any of the offences charged, inasmuch as they were living on their own earnings in respect of these transactions and therefore did not come within the scope of section 1 of the Act of 1898.

Trial at the Central Criminal Court before the Additional Judge (Judge Maude) on January 23, 24, 25, 26, 27, 30, 31 and February 1, 2, 3, 6, 7 and 8, 1956.

The defendants, (1) Bernard Silver, (2) Cyril William Pullinger, (3) Maurice Blair, (4) George Moderadze, (5) Wilfred Jerome Delmaine, (6) Robert Edward Clement, (7) Robert Laurant Falson and (9) Patrick Wilson were charged with offences of knowingly living wholly or in part on the earnings of prostitution, contrary to section 1 of the Vagrancy Act, 1898, as amended by section 7 (5) of the Criminal Law Amendment Act, 1912. Another defendant, Albertine Falson (hereinafter referred to as the " eighth defendant ") was charged in certain cases as an aider and abettor. The indictment contained five counts. In the first count the first, second, fifth, sixth, seventh and ninth defendants were charged with, on divers days between June 23, 1951, and February 18, 1955, living wholly or in part on the earnings of prostitution, namely the earnings of prostitutes then occupying certain flats, and the eighth defendant was charged as an aider and abettor. In the second count the first, second, third, fifth, sixth, seventh and ninth defendants were charged with a similar offence between the same dates relating to the earnings of prostitutes then occupying different flats, and the eighth defendant again was charged as an aider and abettor. In the third count the first, second, fourth, fifth, sixth, seventh and ninth defendants were charged with a similar offence between the same dates relating to the earnings of prostitutes then occupying different flats, and the eighth defendant again was charged as an aider and abettor. In the fourth count the sixth defendant only was charged with a similar offence between August 23, 1954, and April 18, 1955, relating to the earnings of prostitutes then occupying different flats. In the fifth count the first, second, fifth, sixth, seventh and ninth defendants were charged with a similar offence on

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divers days between June 23, 1951, and February 18, 1955, relating to the earnings of prostitutes then occupying flats at divers premises other than those named in the first four counts.

The case for the prosecution was that the respective flats had been let at an exorbitant price each to an individual prostitute with the knowledge on the part of the defendants concerned that she was a prostitute and intended to use the flat for the purposes of prostitution. The defendants contended these facts did not constitute any offence in law.

J. Mervyn Griffith-Jones and *Alastair Morton*, for the prosecution.

Jeremy Hutchinson, for the first and eighth defendants.

Victor Durand and *John Abrahams*, for the second defendant.

The third defendant in person.

R. E. Seaton, for the fourth defendant.

Tudor Price, for the fifth defendant.

Reginald Batt, for the sixth defendant.

Daniel Hollis, for the seventh defendant.

Brian Leary, for the ninth defendant.

JUDGE MAUDE [in his direction to the jury:] I have come to the conclusion, having heard the evidence for the Crown, that, within the law as it is at the present time, there is no case for the defendants to answer and, as this is a matter which may be considered of some public importance, I think it is right that I should set out the reasons for coming to that decision. You yourselves, members of the jury, will not have to make any decision at all; you will simply, at the right moment, return a verdict of Not Guilty on the whole indictment.

This is a case in which nine persons have been indicted under the Vagrancy Act, 1898, for knowingly living wholly or in part on the earnings of prostitution. To summarise the case against them, it is this: that a minority of those in the dock are landlords, and that they have been knowingly letting to prostitutes flats, one flat to one prostitute. Others are said to be engaged in the equally immoral activity, in the capacity of agents, of

letting the flats to prostitutes, knowing that they were going to be used for the purposes of prostitution.

At first sight, without most careful consideration, it would appear that all the persons in the dock, in ordinary language, were clearly knowingly thus living in part on the earnings of prostitution. But the position is not so. All down the recent centuries the common law, as administered in the Sovereign's courts, has known how to deal with what are called brothels. These are places where two or more women in the same premises are plying their trade as prostitutes. Those, you understand, are different from premises where one woman only is operating. In 1885, section 13 of the Common Law Amendment Act added to the scope of the criminal law, in that, first of all, in subsection (1) it made it punishable to keep, or manage, or act, or assist in the management of, a brothel. That added little, if anything, to the existing law. But then it provided in subsection (2) that " any person who . . . being the tenant, lessee, or occupier . . . of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution " shall be liable to certain penalties. It is noticeable that the section does not speak of the lessor or landlord; it speaks of the tenant, lessee, or occupier, or, as was added by a later Act of Parliament, section 4 (1) of the Criminal Law Amendment Act, 1912, the " person in charge " of any such premises. They are the persons to be punished. He or she who stands in the position of a lessor or landlord, or the agent of the lessor or landlord, letting the same or any part thereof with the knowledge that the premises are to be used as a brothel is dealt with by a different subsection (subs. (3)). The lessor or landlord, therefore, was committing an offence if he knowingly let the premises or any part thereof to be used as a brothel, whereas the tenant, lessee or occupier could be punished for so dealing with premises, not only for the purposes of a brothel, but also for the purposes of habitual prostitution. One must be certain that the distinction between the lessor and the landlord on the one hand and the tenant, lessee, occupier, or person in charge on the other

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hand was of importance to Parliament. The Queen's courts can administer the law only as they find it, and they must, and I must, administer it strictly. That is to say, any feeling of indignation which the general public or the judiciary might have at a state of affairs that would appear to be grossly immoral is irrelevant to my present purpose, unless the facts show that an offence has been committed against the existing law.

That being the position in 1885, it is quite obvious that persons who let their premises for the purposes of habitual prostitution for one prostitute only were impossible to hit; only the tenant, lessee, occupier, or person in charge could be struck at. Those who felt strongly that this sort of immorality should be discouraged to the full found in SIVIOUR *v.* NAPOLITANO [1931] 1 K.B. 636 that a tenant, for instance, who was permitting premises to be used in a way forbidden by section 13 (2) of the Act of 1885 could claim the more privileged position of the lessor or landlord if he or she sublet. From 1885 until 1898 that was the position, and one must realise that it was so. Some thirteen years passed, and it was then clear to Parliament in 1898 that, so far as prostitution was concerned, something more needed to be done. It was then made an offence, for the first time, to do something quite different, that is to say, knowingly live wholly or partly on the earnings of prostitution. From 1898 until 1912 the Vagrancy Act, 1898, remained unamended. From 1898 to 1912 no attempt whatsoever was made by the prosecuting authorities to strike at landlords or agents concerned in the letting of premises for prostitution only, as opposed to brothels, by virtue of section 1 of the Vagrancy Act, 1898. After that Act had been amended in 1912, until GORMAN (unreported), a prosecution which was launched at the County of London Sessions on September 8, 1954, no attempt was made to invoke section 1 of the Vagrancy Act, 1898, in the manner in which it has been invoked in this case. Up to date, therefore, so far as is known by the extremely experienced counsel who appear both for the Crown and for the defence and by myself, there has never been any attempt of this kind before 1954. It does not mean, because a statute has been allowed to

slumber, that in fact it is of no effect. If in fact there is, so to speak, a bit of artillery ready to hand, it can be brought out years, and no doubt hundreds of years, later on and properly used.

The question now arises, for the second time so far as is known, what the words " knowingly lives wholly or in part on the earnings of prostitution " mean. It would seem, as I say, to anyone who did not give careful consideration to it, that anybody who received money earned by a prostitute would be committing an offence. For instance, the chemist who sells medicines and other things to a prostitute knowing that she is a prostitute would in part be living, in the broadest sense, on the earnings of prostitution; the doctor who attends her, the lawyer who appears for her, if those persons know that she is in fact a prostitute, would appear to be committing an offence. That, of course, cannot be the intention of the Act. If in fact that were so, the state of the prostitute in this world would be simply appalling; she would be able to get no services, or would get them only with the utmost difficulty, and the same would apply to the food she wanted to buy. It is unthinkable. Therefore, one has to make up one's mind what the Act of 1898 really means.

It has been said in argument before me by both sides that the doctor, for instance, who treats the prostitute knowing that she is a prostitute is not really living on her earnings, although of course the money that is handed over is her earnings; and that what he is, in fact, doing is living on his own earnings, because he has earned his money. The shopkeeper, the grocer and the baker and so forth, earn their money. The doctor gives his services, and the shopkeepers give their goods, in exchange for money. They are, in fact, earning their living, and they are not, therefore, knowingly living in part on the earnings of prostitution at all. But it is said now—and this seems to be the only instance to which I should direct my attention—that where a landlord lets his premises for the purposes of prostitution and gets what I propose to call a " prostitute rent," a wholly different situation arises; that is to say, because the ordinary

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moral rent is less than the " prostitute rent," then, so far as the " prostitute rent " addition is concerned, he is in fact living on the earnings of prostitution. I do not think that he is. I think that what the landlord is doing is living on his own earnings just like the shopkeeper. A shopkeeper who grossly overcharged a prostitute because she was a prostitute would, nevertheless, be living on his own earnings. Utterly, completely and disgustingly immoral though it might be, they would be his own earnings. The doctor earns his money, and so does the barrister, the landlord and the estate agent. They are living in part or wholly—although the professional man has, I suppose, other clients—on money that comes from a prostitute, but they are living on those moneys as the earnings of their professions.

The situation is, no doubt, and will be thought by many to be, a grave one. Times have changed. As one understands from history, when there were brothels, there was very little individual prostitution in flats, and it may be that the problem is so grave that Parliament must do something about it. But that is not for me. I should have no feelings about the subject, nor do I feel that I should do anything to indicate that it is my view that this, that or the other should be done. It is a matter for the authorities to consider now what is necessary. I can see that until such prosecutions as this have been brought it would perhaps be difficult to get Parliament to move in the matter. I do not know whether something will be done about it. It is a fact that in the Vagrancy Act, 1898, there is a subsection (s. 1 (3)) as amended by section 7 (4) of the Criminal Law Amendment Act, 1912), which provides that " where a male person is proved to live with or to be habitually in the company of a prostitute [or is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person or generally] he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution." There is no evidence of that kind in this case, in my view. Therefore,

this is an important, clear-cut case where the statements made by some of the defendants reveal with appalling clarity the situation, which, as I say, amounts to what must be, according to any standard of morality, utterly immoral, but that does not bring them within this particular Act.

I should just like to say this. The matter was argued before me with great care. A number of decisions were quoted to me, and in case what I say should at any time be of assistance in any direction to other persons who have this matter under consideration, I will simply indicate what they were. Needless to say, the leading textbook, Archbold's *Criminal Pleading, etc.*, was referred to; the relevant statutes, including the original Vagrancy Act, 1824, were referred to; and the cases cited were STRATH *v.* FOXON, 39 Cr.App.R. 162; [1955] 3 W.L.R. 659; CALVERT *v.* MAYES [1954] 1 Q.B. 342; LEDWITH *v.* ROBERTS [1937] 1 K.B. 232; ATT.-GEN. *v.* BROWN [1920] 1 K.B. 773, on appeal, [1921] 3 K.B. 29; CHAPMAN, 23 Cr.App.R. 63; [1931] 2 K.B. 606; PRINCE ERNST OF HANOVER *v.* ATT.-GEN. [1955] Ch. 440. I may not even now have enumerated them all, but I believe I have.

I should also like to add this. It looks to me as though the reason for this Act not having been used before has been, in substance, simply that times have been changing, that what was not, in the view of those in charge of prosecutions, a serious menace has become one now, in which every endeavour ought to be made to test through the courts the power of the police, and that has now been done. If my decision is a correct one, then it only remains for Parliament to interfere if they think fit.

The result is that the defendants will be discharged in one moment. Those who have read their statements, or heard them read in court, will have heard narratives of conduct which could not possibly be thought, in the case of most of them, to be other than utterly and disgustingly immoral. But that is not what I am here for, and that is not what you are here for, members of the jury; we are not a court of morals. The problems of prostitution and how to deal with it are infinitely complicated on every sort of consideration that may be known to

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you—and some of them are known to me—it is not anything but a most thorny problem.

I hope that I have done enough to indicate the reasons why I feel certain in my own mind that this is the right decision and why there is no question left in my mind that I may possibly be wrong, although one should always have that at the back of one's mind, I suppose. I am absolutely certain that my duty, sitting here to administer the law, is to tell you now that there is no evidence which would justify your convicting any of the defendants of any of the offences charged, and that your duty is to say in answer to the Clerk of the Court that they are Not Guilty.

On his Lordship's direction, the jury returned a formal verdict of Not Guilty in respect of all the defendants, and they were discharged.

Solicitors: The Solicitor, Metropolitan Police, for the prosecution; William Foux & Co. for the first and eighth defendants; Alfred Kerstein for the second defendant; Tarlo, Lyons & Co. for the fourth defendant.

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THE LORD CHIEF JUSTICE, MR JUSTICE HILBERY AND MR. JUSTICE BYRNE

RONALD JOHN HEALEY

Notice of Abandonment of Appeal—Withdrawal—Misapprehension or Mistake of Fact—Criminal Appeal Rules, 1908 (*S.R. & O.* 1908, *No.* 227), r. 23.

The court allows notice of abandonment of appeal to be withdrawn only if there are special circumstances, or some misapprehension or mistake of fact. The misapprehension must be with regard to something that has happened with regard to the appeal or the notice of appeal. There cannot be a misapprehension or mistake of fact if the applicant has weighed

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up his chances and decided that it would be more advantageous for him to abandon his appeal, but is subsequently advised that his decision was wrong.

Dictum of Avory J. in VAN DYN (1932) 23 Cr.App.R. 150 at p. 152 explained.

Application to withdraw notice of abandonment of appeal.

The applicant was convicted at Chester Assizes on October 26, 1955, of inflicting grievous bodily harm on his wife and was sentenced by McNair J. to five years' imprisonment. On January 16, 1956, an application for leave to appeal against sentence came before the court, but there being a disagreement among the members of the court on whether leave to appeal should be given, leave was given and the hearing adjourned to a court consisting of five judges. On January 18, 1956, the applicant signed a notice of abandonment of appeal.

Elwyn Jones, Q.C. and *Peter Thomas*, for the applicant:

The court has power to give leave to withdraw a notice of abandonment of appeal where there are special circumstances, or where the intending applicant has acted under a misapprehension or mistake: VAN DYN (1932) 23 Cr.App.R. 150. Where there are appealable and arguable issues, the court will not stand on a technicality. The applicant here acted under a misapprehension, because he thought that the court would take no account of mental illness or provocation. The special circumstances relied on are that the applicant abandoned his appeal without consulting his solicitors or counsel because of a newspaper report which he read, which was not a verbatim report and may well have misled the applicant. An affidavit filed by the applicant's solicitor shows that at the time of the abandonment of his appeal the applicant was suffering from mental illness which made it impossible for him to form a proper judgment.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: At the first sitting of the court during these sittings on January 16, the applicant applied for leave to appeal against a sentence of five years' imprisonment

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which was passed upon him by McNair J. at Chester Assizes for inflicting grievous bodily harm on his wife. It is not necessary for me on this application to go into the facts of the case. He applied for leave to appeal against sentence only, and it was quite obvious at the hearing that two members of the court, myself and Ashworth J., thought there were no grounds for giving leave to appeal. The third member of the court, Stable J., thought that there might be grounds for appealing, and therefore he was in favour of giving leave to appeal and, according to the practice of this court, which has been in existence, I believe, ever since it sat, if on application to the court one member thinks leave should be given, it is always given. When the appeal is heard, if there is a dissent and one member of the court thinks that the appeal should be allowed and the other two members think it should be dismissed, the dissenting member has the right, as a rule, of asking that there should be a hearing before a court of five judges. The only matter we had to decide was that leave to appeal should be given.

Leave to appeal having been given, the applicant, who, at that time had been specially treated as a prisoner awaiting appeal, and therefore had facilities for receiving newspapers, seems to have seen a report in *The Times*. The case was before the court on January 16, and he appears on Wednesday, January 18, to have signed a notice of abandonment of his appeal and sent it to this court. At what time it was sent, we do not know, but at any rate apparently on that day he also sent a telegram to his solicitors. He had been represented by solicitors throughout, and he had had the advantage of being represented by Mr. Elwyn Jones, who had done everything that could be done for him at the assizes and applied for leave to appeal to this court.

The applicant sent off the notice of abandonment on January 18. It is signed by himself and witnessed by an executive officer at Wakefield Gaol, and it is in these terms: "I, the above-named appellant, having been convicted and sentenced as above stated and having duly sent to the Registrar

of the Court of Criminal Appeal notice that I desired to appeal to the said court, do now hereby give notice that I do not intend further to prosecute my appeal but that I hereby abandon all proceedings in regard thereto as from the date hereof."

On the cell card which appears in all cells giving prisoners information with regard to their appeal, they are told that, if they give notice of abandonment of their application or appeal, that amounts to a dismissal of the appeal. It is provided by rule 23 of the Criminal Appeal Rules, 1908—and the Rules have the force of an Act of Parliament—that a notice of abandonment is equivalent to the dismissal of an appeal.

There is no doubt that the court has power to allow the withdrawal of a notice of abandonment. It has very seldom allowed it. It is allowed only if there are special circumstances or, as Avory J. put it in VAN DYN (1932) 23 Cr.App.R. 150 at p. 152, some misapprehension or mistake of fact. Exactly what the learned judge meant by "misapprehension" as distinct from a mistake of fact is perhaps difficult to understand. He was thinking probably of some misapprehension as to what had happened with regard to the appeal or with regard to the notice of appeal. I am quite certain that misapprehension or mistake of fact does not arise if the prisoner has been weighing up his chances and decides it would be more advantageous to him to abandon his appeal, and he is then advised that that was an unfortunate decision to make.

The court, with some doubt, but because it has done so on other applications before, has looked at an affidavit which solicitors have made with regard to an interview they had with the applicant on the very day on which he sent his notice of abandonment. They saw him in prison and say: "He had read the result of his application for leave to appeal in the daily papers and had formed the view that, if the appeal was heard, he ran the risk of his sentence being increased or being detained at Her Majesty's Pleasure." I suppose he had formed some opinion about being detained during Her Majesty's Pleasure, because the ground urged upon us was that it was a

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borderline case and he might almost be regarded as insane. I am not going further into that. The affidavit continues: " and that it was obvious to him that his past Service record and past medical history had had no bearing in mitigation whatsoever." Then the solicitors say what advice they gave him, and the applicant said he had " twice had mental breakdowns before and could feel himself improving after his attack upon his wife and subsequent trial "—so he was improving, I suppose, in the quietude of prison—" but he was not fit enough to withstand any further anxiety, and even though the appeal would be heard within five days he would rather serve his five years' sentence, knowing his exact position, than go through five days of apprehension and doubt. He admitted that he was considerably agitated and upset and that the decision he was making was possibly the wrong one but, if he were to follow our advice, he would only inflict upon himself five days' mental strain, which he felt he could not endure." He is perfectly entitled to come to that decision if he chooses. He says: " I am not going to run the risk of having my sentence increased. I am not going to run the risk of the court saying that I should be detained during Her Majesty's Pleasure as a lunatic, and I do not want to have this further anxiety; I would rather serve my sentence," where, he says, he is better than he was before.

In those circumstances, how can this court say that there are special circumstances which would allow it to reconsider an appeal which has been dismissed? The applicant shows that he has weighed up his chances, the advantages and disadvantages, and he has deliberately come to the conclusion that he will abandon his appeal.

Mr. Elwyn Jones has handed us a letter which he himself received from the applicant on the same day. I can only say that it is the letter of a man who, having considered the matter fully, has come to a deliberate decision to withdraw his notice of appeal. In those circumstances we cannot agree that this is a case in which any special circumstances are shown. It is unnecessary to go into the facts of this unhappy case, but I would remind Mr. Elwyn Jones that McNair J. took great care

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and gave the most earnest consideration to it, and I think it would be a very strong thing to hope that this court would interfere. But I am not going into that matter; all I say is that if we were on these grounds to say that a notice deliberately given should be allowed to be withdrawn, we should be making it possible for anybody to come forward who had abandoned his appeal and ask for leave to withdraw his abandonment. This application must be refused.

Application refused.

Solicitors: J. E. Shaw, Stockport, for the applicant.

BEFORE

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JAMES DEVINE

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Breach of Probation Order—Procedure.

Procedure to be followed where there is an allegation of breach of a probation order.

Application for leave to appeal against sentence.

The applicant was convicted at Portsmouth Quarter Sessions on January 2, 1956, of larceny in a dwelling-house and was sentenced by the Recorder (J. Scott Henderson, Esq., Q.C.) to 8 years' preventive detention.

No counsel appeared.

BYRNE J.: There is nothing in this application for leave to appeal against sentence, and it is refused, but the Court desires

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notice to be taken with regard to a point of procedure which it has observed as the result of considering this case. Where a person is brought before a court for breach of a probation order, the breach alleged should be put to him in the clearest possible terms and he should be asked to say whether he admits it or not. The terms in which the matter should be put to him are: first of all, he should be told where he was originally convicted and what happened to him; then he should be told how the breach is alleged to have taken place, and if it be by a further conviction, the occasion of that conviction and the adjudication of the court should also be mentioned; then he should be asked to say whether he admits those facts. If he does, the court can then proceed to deal with him. If he does not, then a trial will take place, albeit without a jury, and he will have to be asked whether he desires to give evidence or call witnesses and the court will have to pronounce whether it finds that the breach of the probation order has been proved; but it is desirable that the proceedings should begin by the matter being put clearly to him and his being asked whether he admits the breach.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BYRNE

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HAYDN COTTRELL

Dangerous Driving—General Disqualification—Misapprehension as to Power of Court to Vary Subsequently—Order Varied to Disqualification Limited to Particular Class of Vehicles—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 6, *s.* 7 (3).

General order of disqualification for driving motor-vehicles of any class varied, after extension of time within which to appeal had been granted despite a long lapse of time, to an order disqualifying the convicted person for driving vehicles of

a limited class, owing to a misapprehension on the part of the court which originally imposed the order with regard to the power of another court subsequently to vary the scope of the order.

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Application for leave to appeal against sentence.

The applicant pleaded Guilty at Glamorganshire Assizes on July 12, 1954, to dangerous driving and was sentenced by Glyn-Jones J. to a fine of £50 and was also ordered to be disqualified for driving a motor-vehicle of any class for 5 years. The judge said at the time that, if the applicant were of good behaviour for 12 months and then applied to have the disqualification removed so far as motor-cycles were concerned, he thought it would be a proper case for indulgence to be shown to the applicant. On November 16, 1955, the applicant, who had been of good behaviour for a year, applied to McNair J. at Glamorganshire Assizes to remove the disqualification so far as motor-cycles were concerned, but McNair J. held that he had no power to vary the disqualification by removing it in part (see (1955) 39 Cr.App.R. 198).

No counsel appeared.

THE LORD CHIEF JUSTICE: This is an application for leave to appeal which comes before the court in very unusual circumstances.

The applicant was convicted before Glyn-Jones J. at the Summer Assizes for Glamorganshire in July, 1954, of dangerous driving. I think he was charged with manslaughter because a death occurred, but he pleaded Guilty to dangerous driving and the prosecution accepted that plea. The dangerous driving was in respect of a lorry. The learned judge fined him £50 and disqualified him from driving all motor-vehicles for a period of five years; but he then went on to say—I suppose because he had some sympathy for this young applicant—that, if he applied after the expiration of 12 months to have the disqualification removed so far as related to motor-cycles, the learned judge thought it would be a proper case in which indulgence could be shown to him. He did apply, after 16 months, at the Glamorganshire Autumn Assizes in November,

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1955, to McNair J. to have the disqualification altered so that he would be permitted to ride a motor-cycle on which he could go to and from work. McNair J. held, as this court thinks quite rightly, that he had no power to make the order. The applicant is now seeking leave to appeal, not against McNair J.'s refusal, but against the original sentence, and, of course, that would involve our extending the time, because the conviction was 18 months ago.

I will first of all deal with the position as it stands under the relevant statute and then say why we are giving him an extension of time to appeal. By section 6 of the Road Traffic Act, 1930, it is provided: " Any court before which a person is convicted of any criminal offence in connection with the driving of a motor-vehicle (not being an offence under Part IV of this Act)—(a) may in any case, except where otherwise expressly provided by this Part of this Act, and shall where so required by this Part of this Act, order him to be disqualified for holding or obtaining a licence for such period as the court thinks fit." . . . " Provided that, if the court thinks fit, any disqualification imposed under this section may be limited to the driving of a motor-vehicle of the same class or description as the vehicle in relation to which the offence was committed." Where, therefore, a person is convicted of an offence which either carries or enables the court to impose disqualification, the court can do one of three things. It may, except in cases where disqualification is directed, refuse to disqualify. Secondly, it may disqualify a person entirely from getting a licence to drive, or thirdly, it can say " We disqualify you from driving the particular class of vehicle which you were driving at the time of the offence."

Then there is this provision in section 7 (3): " A person who by virtue of a conviction or order under this Part of this Act is disqualified for holding or obtaining a licence, may, at any time after the expiration of six months from the date of the conviction or order, and from time to time apply to the court before which he was convicted or by which the order was made to remove the disqualification, and on any such application the

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court may, as it thinks proper, having regard to the character of the person disqualified and his conduct subsequent to the conviction or order, the nature of the offence, and any other circumstances of the case, either by order remove the disqualification as from such date as may be specified in the order or refuse the application."

The applicant applied, as I said, to McNair J. at the last Autumn Assizes under that subsection. McNair J. said: "That subsection does not enable me to do what you ask. It enables me to remove the disqualification, but it does not enable me to vary the disqualification." I think this is a point to which the Minister's attention might be drawn, as we all know that there is a Road Traffic Bill before Parliament at the present time, and it might be a useful thing to include a provision that a court may not only remove disqualification but also vary a disqualification. The applicant, therefore, found that the disqualification imposed by Glyn-Jones J. still stood.

The first thing we have to decide is whether we should give him leave to appeal against his original sentence, that is, the sentence imposed by Glyn-Jones J. in July, 1954. Glyn-Jones J. obviously meant that he did not wish the disqualification with regard to a motor-cycle to remain in force for all the five years for which he disqualified the applicant from holding a licence; and the learned judge, no doubt *per incuriam*, thought that under section 7 the applicant would be able to go to the court, as he said, in a year, which would indicate to the court the time for which he thought the full disqualification ought to remain, to get it varied, but unfortunately the learned judge was in error in that. The learned judge, knowing that this case was coming on, has seen me, and has explained to me that, if he had realised what the consequences would have been, he would probably have done what he undoubtedly had power to do, namely, limited the disqualification to the driving of lorries and possibly the driving of motor-cars and he would not have disqualified the applicant from driving motor-cycles. The position is that the applicant has been led to believe by what the learned judge said at the trial that, after an interval

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of not less than a year, he would be able to get permission to drive a motor-cycle. It would be very hard luck on him if, by reason of an error into which the learned judge fell at the moment, and an error of the kind into which we are all liable to fall from time to time because it is impossible to bear in mind all the various provisions of the Road Traffic Act with regard to disqualification, a more serious punishment was put upon him than Glyn-Jones J. intended; and the court cannot help taking notice of the fact that he has now been for more than a year disqualified from driving his motor-cycle. We do not think it is necessary to call on the prosecution, because there is no law in the case. It is a strong thing to do after all this time, but we think in the particular circumstances that the applicant has been misled by an error of the learned judge, and that he ought to have an extension of time in which to appeal. We give him leave to appeal against his sentence and we treat this application as the hearing of the appeal. We have decided to alter the sentence passed by Glyn-Jones J. by leaving the disqualification as it stands for five years, but limiting it, under the proviso to section 6, to driving motor-lorries. That will enable the applicant now to drive a motor-cycle.

Sentence varied.

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THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BYRNE

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FREDERICK PEARSON MOORE

Plea of Guilty by one Defendant—Not to be Regarded in any Sense as Evidence against Co-Defendant.

A plea of Guilty by one defendant is in no sense to be regarded as evidence against a co-defendant.

The appellant was indicted together with R. for housebreaking and larceny at a country inn. R. pleaded Guilty and

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the appellant Not Guilty. The evidence called for the prosecution showed that the offence had been committed between 2 a.m. and 7 a.m. Witnesses identified two persons who had been in the inn as customers on the previous evening as the two prisoners; another witness deposed to having seen two men, whom he could not identify, but who resembled the two prisoners in appearance, walking together on the road near the inn about 1.15 a.m. on the morning of the offence; and two other witnesses identified two men whom they saw together at a bus stop about a mile from the inn at 6.30 a.m. on the same morning as the two prisoners. When interviewed by the police, the appellant said that he knew R., but not very well, and when taken by them to the inn said that he had never at any time been inside it. No evidence was called for the defence.

Held, that there was no evidence fit to be left to the jury against the appellant, and that the case should have been stopped at the close of the case for the prosecution.

Appeal against conviction.

The appellant was convicted at Northamptonshire Quarter Sessions on January 6, 1956, of housebreaking and larceny and was sentenced by the Deputy-Chairman (Judge Carr) to 4 years' imprisonment.

The appellant was indicted together with a man named Rynn, who pleaded Guilty. The premises named in the indictment were a country inn, and the evidence showed that it had been broken into between 2 a.m. and 7 a.m. on a morning in November, 1955. Evidence was given by the wife of the licensee and a customer that they had seen both men in the bar of the inn on the night before the offence; by a soldier that he had seen two men, neither of whom he was able to identify, but who, he said, resembled the two prisoners, walking together on the road not far from the inn about 1.15 a.m. on the day of the offence; and by two persons that they had seen the two prisoners together near a bus stop about one mile from the inn about 6.30 a.m. on the same morning. When interviewed by the police, the appellant said that he knew Rynn, but not very well. He was taken to the inn, and there told the police that he had never at any time been inside it. The appellant did not give evidence, and no evidence was called for the defence.

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Jane A. Russell Cargill, for the appellant:

There was no evidence connecting the appellant with the crime. Rynn's plea of Guilty was in no sense evidence against the appellant, but appears to have been treated as such throughout the case by the prosecution and in the summing-up. Even assuming that the appellant lied to the police about never having been inside the inn, that was no evidence associating him with the crime. A man with a criminal record such as the appellant may have many reasons for lying to the police. [She was stopped.]

T. R. Fitzwalter Butler, for the Crown:

It is conceded that Rynn's plea of Guilty was in no sense evidence against the appellant, and the jury were clearly told so by the Deputy-Chairman. Apart from the lie which the jury must have been satisfied was told by the appellant to the police, there would have been no sufficient evidence against him; the evidence would have been merely that of opportunity. When, however, the jury were considering what inference they ought to draw from the lie, they were entitled to consider the evidence of association between the appellant and Rynn, and consider whether he had not lied with regard to this also, which would render the lie all the more material. The lie was not, of course, conclusive evidence of guilt against the appellant and the jury were so directed; but in the circumstances it was some evidence from which the jury, if they chose, were entitled to draw the inference of guilt. The case obviously required an extremely careful summing-up, and this the jury received.

THE LORD CHIEF JUSTICE: The appellant was convicted at Northamptonshire Quarter Sessions of the offence of breaking and entering a dwelling-house and stealing therein. He was indicted together with a man named Rynn, who on the day before the trial pleaded Guilty to this crime.

Miss Cargill has submitted to us that there was no evidence proper to be left to the jury implicating the appellant in the crime, and she has criticised certain points in the summing-up. We think that the summing-up of the learned Deputy-Chairman

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was really very careful, and it is on the ground whether there was evidence to go to the jury that the court is deciding this case.

The facts proved were these. The premises, a public house, were broken into some time after 2.30 a.m., but no one really knows the exact time. Evidence was given, which we must assume the jury accepted, that the appellant was in the public house on the previous night with Rynn. There was evidence that the next morning about 6.30 a.m. he and Rynn were at a bus stop about a mile away. So we get the two things: first, there was evidence, which the jury must have accepted, that the appellant was a customer in the public house the night before about closing time, and, secondly, that he was still in the neighbourhood of the village about 6.30 a.m. next morning. Those two things, taken either separately or in conjunction, prove nothing as far as this offence is concerned.

Then there comes this further point. Later, when the police interviewed the appellant, they asked him whether he had any objection to going with them to the public house. He said that he had no objection and they took him there. When they got there, he said: "I have never been in this public house before in my life." We must assume for the purposes of the case that that was a lie, and Miss Cargill, who has put forward every consideration on behalf of her client, does not suggest that it must be treated otherwise. If the jury believed the evidence which had been given, there were people who identified him as having been in the public house the night before the crime. Of course, a man cannot be convicted of burglary or housebreaking merely because he tells a lie by saying that he was not somewhere when he in fact was. But, it was argued, the importance of the lie was that the appellant was in the company of Rynn in the public house, and Rynn pleaded Guilty. When two people are indicted together for a criminal offence and one pleads Guilty and the other does not, it is the commonest thing in the world to tell the jury, as was done in this case, "You must not pay any attention to the fact that the other man has pleaded Guilty." Even if the plea has not been taken in the presence

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of the jury, it is very difficult to avoid telling the jury in some way that the other person has pleaded Guilty, but the fact that he has pleaded Guilty is no evidence against his co-prisoner. That was laid down by both Hale (*Pleas of the Crown*, Vol. I, p. 585n.) and Hawkins (*Pleas of the Crown*, Book 2, c. 46, s. 34) and also in TONGE (1662) 6 St.Tr. 225, the accepted principle being that a man's confession is evidence only against himself and not against his accomplices. If a prisoner pleads Guilty, it does not affect his co-prisoner. What was said in this case was that, if the appellant was in company on the night before the crime with a man who pleaded Guilty, that was evidence on which a jury could find the appellant equally guilty, especially as there was some evidence by a soldier that the appellant was seen walking with the other man during the night in the neighbourhood of the public house.

Rynn was brought up during the case for identification, and naturally the jury got it very much into their minds that Rynn had pleaded Guilty and that, if the appellant was with Rynn that night, he must be guilty. At any rate, we think that the Deputy Chairman ought to have stopped this case and said that there was not enough evidence to go to the jury. The appellant, very likely with the sound advice which Miss Cargill gave him, was sensible enough not to go into the witness-box because, if he had, he could have been cross-examined about many things with regard to his association with Rynn. The police seem to have gone as far as they could in reading Rynn's statement to the appellant. That is a very old device, and I am not saying that anything improper was done in this case, but, taking all these matters into account, we cannot say that the conviction was supported by the evidence. At the close of the case for the prosecution, the Deputy Chairman should have held that, however suspicious the case might be—and of course it was a case of great suspicion—there was not enough evidence to justify conviction, and therefore this conviction must be quashed.

Conviction quashed.

Solicitors: Perkins & Tustin, Northampton, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BYRNE

ALAN HARRY HUDSON

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Revenue—Income Tax—False Statement Tending to Prejudice the Queen with Intent to Defraud—Statement otherwise than in Document Authorised or Required to be Made by Statute—False Accounts Sent to Inspector of Taxes.

The offence of making a false statement tending to prejudice the Queen and the Public Revenue with intent to defraud the Queen is, and always has been, a common law misdemeanour, and includes the offence of causing to be delivered to an inspector of taxes accounts relating to the profits of a business which falsely and fraudulently state the profits to be less than they actually were.

BEMBRIDGE (1783) 22 St.Tr. 1 followed.

Appeal against conviction.

The appellant was convicted at Nottinghamshire Assizes on December 8, 1955, on eight counts of an indictment charging him with making false statements tending to prejudice the Queen and the Public Revenue with intent to defraud the Queen, and was sentenced by Slade J. to fines totalling £2,600 and was ordered to pay £1,500 costs.

The indictment contained nine counts. Eight (on one of which the appellant was acquitted) related to causing to be delivered to an inspector of taxes false profit and loss accounts and balance sheets, and the ninth count related to a document called a " certificate of full disclosure " which the appellant had sent to the inspector of taxes at the inspector's request. The appellant carried on the business of a fruit grower in a large way, and it was his practice to have his accounts prepared by an accountant. Some years afterwards his accounts were found to be false, in that they had omitted a considerable number of receipts which ought to have been included as trading receipts.

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N. E. Mustoe, Q.C. (*Victor Durand* with him), for the appellant:

The following questions are raised in the appeal: first, whether the causing of false accounts to be submitted to the Inland Revenue is an offence at common law; secondly, whether it is an offence by statute; thirdly, whether a proposition that a wrong is indictable if the Crown is concerned, even though as between subject and subject it would give rise only to a civil action, is a valid proposition; fourthly, whether BEMBRIDGE ((1783) 22 St.Tr. 1) and the judgment of Lord Mansfield therein were confined to acts done by officials or by persons holding public office; fifthly, whether if the judgment in that case was not confined to those two categories of persons it is good law today; and, sixthly, whether BRADBURY AND EDLIN (unrep.), decided before Bray J. at Hampshire Summer Assizes in 1920 was rightly decided.

In former days the judges took the view that they were exercising the jurisdiction of the Court of Star Chamber and could decide whether a particular transaction was indictable or not. In those days the courts did not act on any particular principle. Sometimes the prevalence of the particular transaction was regarded as sufficient to render it indictable; in other cases the public nature of the transaction was adopted as the test. During the last 150 years, however, the law has developed away from the conception that a generality could be applied to specific instances, and it has been regarded as the province of Parliament to say what are and what are not to be crimes. This is illustrated by the recent decision of this court in NEWLAND AND OTHERS 37 Cr.App.R. 154; [1954] 1 Q.B. 158 with regard to public mischief. A court could not accept at the present time that there is such an offence as a common law cheat. Lord Mansfield in BEMBRIDGE (*supra*) was deciding only that a fraud by a public officer on the public was indictable, and that is the test which should be applied today. The mere fact that the Crown is concerned in a particular wrong does not render it indictable. If the acts alleged by the prosecution to constitute an offence were now properly to be regarded as such,

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Parliament would have specifically dealt with it, and they had ample opportunity of doing so in the various Income Tax Acts.

The Attorney-General (*Sir Reginald Manningham-Buller*, Q.C.), *Richard Elwes*, Q.C. and *J. A. Grieves*, for the Crown:

Since 1917 the offence charged in the present indictment has been charged in more than 100 cases, where convictions were obtained. Twenty-eight different judges of the High Court have held that the offence existed, and only in five cases has the point here raised by the appellant been taken, and it has never been successful.

THE LORD CHIEF JUSTICE: The appellant was convicted before Slade J. at the last Autumn Assizes for the County of Nottingham on an indictment which charged him that he caused to be delivered to an inspector of taxes certain accounts relating to his business as a fruit grower and farmer for various years (I will not go all through the different counts), which accounts falsely stated that the profits for the business for a particular year were much less than they in fact were. There were eight counts (upon one of which he was acquitted) dealing with various periods, and on the ninth count he was charged that, with intent to defraud, he caused to be delivered to an inspector of taxes a certificate of disclosure, wherein he certified that he had made a complete disclosure of banking accounts existing in his own name or his wife's name between certain dates, and of all facts bearing on his liability to income tax or other duty between those dates, well knowing such certificates to be false, and he was convicted of that count also.

The point which has been taken and argued with much ingenuity and clarity by Mr. Mustoe, after searching reports on the criminal law, is that the counts charged an offence unknown to the law. It is perfectly true that the offence is not an offence which is specifically included either in the Income Tax Act, 1952, or in the Perjury Act, 1911. It is an offence which arises in this way. Sometimes a trader, instead of making a return of his profits by putting a figure into his

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income tax return, sends in his profits and leaves the inspector to decide how much his return should show. Of course, if he sends in incorrect accounts, knowing that they are incorrect, he is deliberately endeavouring to defraud the Crown and he is endeavouring to mislead the inspector who has got to calculate the liability to tax from the documents which have been sent to him. The object of the certificate is that the income tax authorities, when they have got a large bundle of such accounts which have been sent in, and when they are going to consider whether they will effect a settlement between themselves and the taxpayer, require him to give a certificate. Although they call it a " certificate," it is no more than a statement; it is not a statutory document. In other words, they are saying, in effect, " Tell us in so many words that you have made full disclosure." If a taxpayer says that he has made a full disclosure when he knows full well that he has not, then, of course, he is acting fraudulently.

The point which has been argued here is that the sending in of such false accounts and the giving of such a false certificate do not disclose an offence known to the law. The matter, as I have already said, is not dealt with expressly in the Income Tax Act or in the Perjury Act, because, I suppose, the fact that people sometimes send in such accounts instead of including the amount in their return was overlooked. But because such offences are not mentioned in any particular section of any particular Act, there is no reason why, if what is done is an offence at common law, it should not be prosecuted as such.

Indeed, when this very point came before a judge of great experience in Northern Ireland, Andrews L.J., in THE KING *v.* " J " [1933] Ir.R. 73, he expressly called attention to that fact. He said, in giving his various reasons (at p. 78): " The second reason for my opinion is founded on the express words in section 224 of the Income Tax Act, 1918, which provides that the provisions of that Act ' shall not affect any criminal proceedings for any felony or misdemeanour.' Therefore, no enactment which provides for the imposition of treble charge or for power to have the matter considered at petty sessions, in any way

interferes with the common law rights of the King." There is the section which says it does not affect the common law rights.

Therefore, what we have to decide, and in my view the only point that we have to decide, in this case is whether such conduct discloses a common law offence which is a fraud on the King. That is the charge. It is laid down, first of all, in Hawkins' *Pleas of the Crown*—and everyone knows that that is a work of the highest authority and has been cited in courts for many, many days—in this way (Book I, Chap. 23, p. 322): " All frauds affecting the Crown and public at large are indictable as cheats at common law, as in the following case," and then an illustration is given. The reason why it cannot be said that mere cheating is an offence is because it has not been held that if one subject merely cheats another by telling him lies, that is indictable; but it is otherwise if the false representation or the false device (or whatever it may be) is used to defraud the King, the Sovereign, because that is a fraud on the public. The Crown and the public, of course, are really synonymous terms. In East's *Pleas of the Crown*, which is at least a book of as high authority as Hawkins, it is said (Vol. II, Chap. XVIII, p. 821): " All frauds affecting the Crown and public at large are indictable, though arising out of a particular transaction or contract with the party." Then he cites much the same cases as Hawkins cited.

The matter came before the Court of King's Bench in 1783 when a public officer, one Charles Bembridge, was indicted for a fraud on the Crown because he had wrongly certified, knowing that he had wrongly certified, the amount due from the late Paymaster-General, Lord Holland, to the Crown. It does not appear that he had got anything out of it, but he did it and did it fraudulently, as found by the jury. Lord Mansfield, in giving the judgment of the court when a motion had been made for arrest of judgment, refused the motion on two grounds. He said this ((1783) 22 St.Tr. 1 at p. 155): " . . . the objection then is, that at most this amounts to a breach of trust, a concealment, a fraud of a pecuniary nature, which is a civil injury, and therefore not indictable; that he is accountable—an agent,

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a trustee that embezzles money, or by neglect suffers it to be lost, is accountable—for a civil injury, and not for a public offence; and further, they add that there is no precedent exactly the same. The law does not consist in particular instances, though it is explained by particular instances and rules, but the law consists of principles which govern specific and individual cases, as they happen to arise." The learned Lord Chief Justice goes on: "Now, there are two principles which seem to me clearly applicable to this prosecution; the first I will venture to lay down is, that if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the King for his execution of that office; and he can only answer to the King in a criminal prosecution, for the King cannot otherwise punish his misbehaviour, in acting contrary to the duty of his office, and that this holds equally by whomsoever or howsoever he is appointed to the office"; and then he goes on to give instances which I need not read. Then he continues (at p. 156): "There is another principle too, which I think applicable to this prosecution, and that is this: where there is a breach of trust, a fraud, or an imposition in a subject concerning the public, which, as between subject and subject, would only be actionable by a civil action, yet as that concerns the King and the public (I use them as synonymous terms), it is indictable." That is the clearest possible statement by a great master of the common law that a fraud on the public by an individual is indictable, although the particular fraud might not have been indictable if it had been a fraud by one subject upon another.

The simple question is therefore this: Has that law ever been altered? We can find no case in which it ever has been altered. The doctrine laid down by Hawkins, the doctrine laid down by East, was affirmed in the case which I have cited in the clearest possible manner by Lord Mansfield. Mr. Mustoe, in the course of his very careful argument, submitted to us that all Lord Mansfield was deciding was that a fraud by a public officer on the public or on the King (which is the same thing)

was indictable. But that is not what Lord Mansfield decides. He decides—and it has been repeated in other cases—that a fraud by a public officer on the public is indictable. It may be that a particular fraud could only be punished by indictment, especially if the wrongdoer has got no money out of it for which he could be made to account. But that is only one instance which is given. Then comes the other instance which says that, not only if public officers, but if any subject acts in such a way as to defraud the King, that is an indictable misdemeanour. That is exactly the case which we have got here.

Thirty-five years ago the same objection was taken before Bray J. at Hampshire Summer Assizes, July, 1920, in BRADBURY & EDLIN (unrep.) where on an indictment in this form (which form had then been used by the Inland Revenue for some two or three years, and since then has always been used for this class of offence), the learned judge held, without any hesitation apparently, that the facts disclosed a common law misdemeanour. This form of indictment has been used ever since by the Inland Revenue where the offence charged was that of sending in false accounts. It has been challenged once or twice, but it has never been challenged after conviction by being brought up to this court. It seems to me perfectly clear that since the matter was ventilated before Bray J. the *communis opinio* among lawyers has been that his decision was right, and I cannot see any ground upon which we can say that the authorities upon which Bray J. acted, and upon which we are acting today, have ever been limited or dissented from. As I say, in Northern Ireland the same view has been taken in the reported case to which I referred at the beginning of this judgment, and it has never been in any way dissented from in Northern Ireland.

The offence here was sending in documents to the inspector of taxes which were false and fraudulent to the defendant's knowledge. That, of course, is a material part of the offence, and the jury found it proved. They had a very clear summing-up from Slade J., who took the same view that Bray J. had taken and that this court is taking. The jury must be taken

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not only to have found that these documents were false and fraudulent and that the defendant knew that they were false, but they must also have taken the view, which was the only possible view, that he did it for the purpose of avoiding the payment of tax, and that is for the purpose of defrauding the Crown and defrauding the public. In our opinion, the appellant was properly convicted, and the law as stated by Hawkins, by East, by Lord Mansfield, by Bray J. and by Andrews L.J. in Northern Ireland remains exactly as it always has been. This is a common law offence and has always been a common law offence. It is not necessary for this court to make a new offence and we are not making a new offence. We are merely reaffirming what the common law has, in our judgment, always been on this matter.

For these reasons the appeal is dismissed.

Appeal dismissed.

Solicitors: Jaques & Co., for Ollard, Ollard & Sessions, Wisbech, for the appellant; Solicitor for Inland Revenue, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE PEARSON

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MARSHALL NICHOLAS BRYCE

Fraudulent Conversion—Ingredients of Offence—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 20 (1) (iv) (*a*).

On a charge of fraudulent conversion contrary to section 20 (1) (iv) (*a*) of the Larceny Act, 1916, it must be proved that money or property was entrusted to the prisoner for a particular purpose; that he used it for some other purpose; and that such misuse was fraudulent and dishonest.

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Appeal against conviction.

The appellant was convicted at East Kent Quarter Sessions on September 24, 1955, of obtaining credit while an undischarged bankrupt, for which he was sentenced by the chairman to 2 years' imprisonment, and also on four counts alleging fraudulent conversion of money, for which he was sentenced to 3 years' imprisonment, all the sentences to run concurrently.

D. West Russell for the appellant.

Michael Parker for the Crown.

HALLETT J.: The appellant was convicted at East Kent Quarter Sessions on an indictment containing five counts. With regard to the first count, which was for obtaining credit while an undischarged bankrupt, this court, when it heard the application for leave to appeal, refused leave and it is not necessary to say anything more.

With regard to the other counts, which were for fraudulently converting money to the appellant's own use, this court feels that the conviction must be quashed. Where the charge is one of fraudulent conversion, it is essential that three things should be proved to the satisfaction of the jury; first, that the money was entrusted to the accused person for a particular purpose; secondly, that he used it for some other purpose; and thirdly, that such misuse of the money was fraudulent and dishonest.

On the third point, the chairman amply directed the jury on the materials which existed to enable them to come to the conclusion that the actions of the appellant had been dishonest. The jury took that view and we see no reason to differ from them. But with regard to the first ingredient of the offence, namely, that there was an entrusting for a specific purpose, there appears to have been no real direction to the jury at all, and even if there had been a direction on such materials as are disclosed in the summing-up, we doubt whether there was any evidence that the money was in fact entrusted for a specific purpose. The appellant went round and found some people

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who wanted what may be compendiously described as gardening work done for them. He offered to do it and agreed a price with them. Then, on various pretexts that he would have to buy material and so forth, which varied slightly in different cases, he got payments on account. In the first case it is quite plain that the lady concerned, Mrs. Coote, paid the appellant the sum of £25 on account. In the second case there are similar facts. In the fourth case there is some evidence that the appellant did buy the wood which he said he would have to buy, but there is no evidence in that case about the sum being entrusted for a specific purpose. What is referred to in several places in the summing-up is that the appellant had got the money on a pretence that he had to do something. For instance, in the second case and in the fourth case the chairman said that the appellant used his supposed requirements as a pretence to get money, and there are some places where the chairman appears to have been summing up a case of false pretences. There is a difficulty about supporting a case of that kind, as has been pointed out in DENT, 39 Cr.App.R. 131; [1955] 2 Q.B. 590, and I agree with the Lord Chief Justice that it is very much to be hoped that people who get money in this way may be decided to have committed a criminal offence, but it did not amount to fraudulent conversion on the facts here; and if that charge was the one most likely to be made out, it needed a proper direction from the chairman, which was not forthcoming.

For these reasons, the conviction for fraudulent conversion on counts 2, 3, 4 and 5 must be quashed, but the conviction for the bankruptcy offence for which the appellant was sentenced to 2 years' imprisonment is, of course, unaffected and must stand.

Conviction quashed in part.

Solicitor: R. P. Tunstall, Maidstone, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BYRNE

JOHN McKENNA

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Witness—Power of Judge to Recall—Close of Case for Prosecution.

A judge has complete discretion whether a witness who has given evidence shall be recalled after the prosecution have closed their case and a submission that there is no case to go to the jury has been made by the defence. The Court of Criminal Appeal will not interfere with the exercise of such discretion unless it appears that thereby an injustice has resulted.

SULLIVAN (1922) 16 Cr.App.R. 121; [1923] 1 K.B. 47 followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on October 11, 1955, on six counts of an indictment which charged him with the export of certain articles in contravention of article 2 of the Export of Goods (Control) (Consolidation) Order, 1952, and was sentenced by the Commissioner (Judge Aarvold) to a fine of £3,150 and ordered to pay costs.

The articles in question included steam-rollers, lorries, traction engines, a Scammell Prime Mover and concrete mixers. In order to be within the terms of the Order, the articles had to be "goods subjected to any process of manufacture, wholly or mainly of iron or steel," and not elsewhere specified in Schedule A to the Order. The articles in question were not specified elsewhere in the Schedule. At the close of the case for the prosecution, it was submitted on behalf of the defence that there was no case to answer on the ground that there was no evidence that any of the articles in question were made wholly or mainly of iron or steel. The Commissioner thereupon recalled one of the prosecution witnesses in order to give evidence of the materials of which the articles were

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made and, after the witness had given evidence, ruled that there was a case to go to the jury.

Leonard Caplan, Q.C., and *D. P. F. Wheatley* for the appellant.

S. Alastair Morton for the Crown.

The arguments appear from the judgment.

BYRNE J.: Mr. Caplan, on behalf of the appellant, takes two points. The first point arises in this way. At the end of the case for the prosecution at the Central Criminal Court he submitted on behalf of the appellant that there was no case to go to the jury on the ground that there was no evidence that the articles in question were made wholly or mainly of iron or steel. The learned Commissioner was undoubtedly impressed by that submission, which was quite obviously, on the face of it, highly technical, because, as has been pointed out during the hearing of this appeal, it is not a very great leap of the imagination to think that steam-rollers or traction engines are made mainly of iron or steel. However, the learned Commissioner decided to recall a witness who had already given evidence for the prosecution. That witness having been recalled and having solemnly pronounced on the material of which the articles were made, the learned Commissioner then held that there was a case to go to the jury. Mr. Caplan's first point is that, the case for the prosecution having been closed, the learned Commissioner was not entitled to take the course which he did. It is, in the opinion of this court, sufficient to say that the course taken by the learned Commissioner is one which has been recognised as being a perfectly proper course for many years. It is only necessary to refer to SULLIVAN (1922) 16 Cr.App.R. 121; [1923] 1 K.B. 47, where it is at once to be seen that a judge, in the circumstances in which the learned Commissioner acted in this case, has complete discretion whether a witness shall be recalled, and this court will not interfere with the exercise of his discretion unless it appears that thereby an injustice has

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resulted. It is quite obvious that there was no injustice in this case, and indeed this court is of opinion that without the evidence of the recalled witness there would have been sufficient evidence for the case to go to the jury.

The second point which Mr. Caplan takes is that the learned Commissioner insufficiently directed, or misdirected, the jury with regard to the Order with which he had to deal. [His Lordship referred to the summing-up and said that, in the opinion of the court, the direction given by the Commissioner was a proper one.]

There is, in the opinion of this court, yet another way of looking at this case. By the Order under which the prosecution took place, the export of certain goods from the United Kingdom to certain places is prohibited. Those goods are indicated in group 6 (2). The goods in question had, long before the prosecution took place, left this country. Prima facie evidence was given at the trial that they were made wholly or mainly of iron or steel. If the contention of the defence was that those articles were not wholly or mainly of iron or steel, that was a matter peculiarly within the knowledge of the defence, and, in those circumstances, steps could have been taken to demonstrate by evidence the fact that the contention of the prosecution was wrong. No such evidence was given, and it is now submitted that it was for the prosecution to prove in each case that the goods were made wholly or mainly of iron or steel. That is not the view this court takes.

This appeal is dismissed.

Appeal dismissed.

The court ordered that the appellant should pay the taxed costs of the prosecution.

Solicitors: Percy Haseldine & Co., for the appellant; The Solicitor for Customs and Excise, for the Crown.

[CENTRAL CRIMINAL COURT CASE]

BEFORE

MR. JUSTICE DEVLIN

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R. *v.* MARTIN & OTHERS

Jurisdiction—Offence Committed out of United Kingdom—Offence Committed on British Aircraft—Possession of Dangerous Drug —Plea to Jurisdiction—Offence not Triable in England— Dangerous Drugs Regulations, 1953 (*S.I.* 1953, *No.* 499), *reg.* 3—*Civil Aviation Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 67), *s.* 62 (1).

By section 62 (1) of the Civil Aviation Act, 1949: "Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

If, apart from the above section, the act alleged to constitute an offence would not be an offence if committed outside Great Britain, the above section has no operation to create an offence. A statutory offence, which is, by the terms of the statute creating it, an offence only if committed in Great Britain, *e.g.*, the possession of a dangerous drug contrary to regulation 3 of the Dangerous Drugs Regulations, 1953, does not have extra-territorial operation by virtue of the above section, so as to render the prohibited act an offence if committed on a British aircraft outside Great Britain.

Semble, however, offences such as murder or larceny, which are offences against the moral law and are to be regarded as wrong wherever they are committed, would by virtue of the above section, if committed on a British aircraft outside Great Britain, be offences triable in England.

Trial before Devlin J. at the Central Criminal Court.

The defendants, Matthew Martin, John William Marns and George Bellamy, who were charged with a conspiracy to contravene the provisions of the Dangerous Drugs Act, 1951, and the Dangerous Drugs Regulations, 1953, in that on divers days between January 1, 1954, and August 18, 1955, in Hertfordshire, Middlesex, and elsewhere, and on British aircraft, they conspired together and with certain named persons and

other persons unknown to contravene the provisions of the Act and the Regulations by being in possession of raw opium on British aircraft. The defendants were also charged on three further counts with being in unlawful possession of drugs contrary to regulation 3 of the Regulations.

On arraignment all three defendants entered pleas to the jurisdiction.

J. G. Foster, Q.C. (*Alan Campbell* with him), for the defendant Martin.

The possession of raw opium was somewhere between Bahrein and Singapore, that is to say, outside the United Kingdom. The prosecution's case appears to be that by virtue of section 62 of the Civil Aviation Act, 1949, wherever an act is committed on a British aircraft which, if committed in England, would be an offence under English law, it becomes an offence as if committed in England. The submission of the defence, however, is that the section merely provides the venue of an offence which, if committed abroad, is an offence under English law. The section is not an offence-creating section, and the "jurisdiction" referred to is the power to try the case from the point of venue. If an Act creating an offence is intended to have extra-territorial effect, special care is required in the drafting to give clear indication of the intention. If the contention of the prosecution is right, not only British subjects, but also foreigners would be liable, although the particular act might be quite legal by their law. That would be quite an intolerable position and would create great hardship. On the construction contended for by the defence, the section is apt to create venue of certain offences, *e.g.*, offences under the Treachery Act, 1940, which expressly provides that treachery on an aircraft shall be an offence under English law, or bigamy.

S. C. Silkin, for the defendant Marns:

The argument for the previous defendant is adopted. Having regard to the fact that the section is a penal one, it should be regarded as one creating venue and not offences.

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A. Melford Stevenson, Q.C. (*Alan Orr* and *W. A. B. Forbes* with him), for the defendant Bellamy:

The previous arguments are adopted. There is a presumption that a statute is not to be construed as giving extra-territorial jurisdiction, unless it is so expressly stated.

T. Christmas Humphreys (*E. J. P. Cussen* with him), for the Crown:

Section 62 has used wide and simple language, and has drawn no distinction between foreigners and British nationals. Here the legislature has provided in one section what has required several sections of the Merchant Shipping Acts in regard to the position on ships. Its plain meaning is that a British aircraft is to be treated as part of the United Kingdom. If the argument for the defendants is right, persons would be able openly and flagrantly to carry drugs on British aircraft without any law being applicable to them.

DEVLIN J.: The prisoners at the bar are arraigned upon an indictment which alleges that they committed offences against the Dangerous Drugs Act, 1951, and the Dangerous Drugs Regulations, 1953, which were made under the Act. The gist of these offences is that, as persons who were employed as part of the personnel on British aircraft, they took raw opium from Bahrein to Singapore.

I do not know, and I have not been told and it is not relevant that I should be told, whether the export of opium is prohibited from Bahrein or the import into Singapore. I daresay it was, since it is alleged by the prosecution that these men were given considerable sums of money for the services they performed in secretly carrying the opium. But for the purposes of this case that is quite irrelevant, because these men are not arraigned upon an indictment which charges them with offences against the law of Bahrein or the law of Singapore, but one which charges them with offences against the law of England. For this purpose, therefore, I must assume, though in fact the assumption makes no difference, that the export and import of opium would not be contrary

to any foreign law. The offence alleged under English law is a breach of regulation 3 of the Dangerous Drugs Regulations, 1953, which provides: "A person shall not be in possession of a drug unless he is generally so authorised . . ." "A drug" includes raw opium, and regulation 3 is in that part of the Act which is intended to control raw opium. It is not suggested that any of these men had any authorisation to be in possession of the drug. Accordingly, the offence against each is simply this, as it is stated in the indictment, that on a British aircraft, such-and-such a number, he was in unlawful possession of raw opium.

It is conceded by the prosecution that that regulation by itself applies only to acts committed in England; that is to say, only to the possession of raw opium in England. It is also conceded that, if necessary, the indictment could be framed more specifically to show that none of these British aircraft were in England at the time when the accused were alleged to be in unlawful possession of the opium. Accordingly, learned counsel for the three defendants have all moved that I should quash the indictment on the ground that this court has no jurisdiction to try the offences alleged in it.

Mr. Humphreys, for the prosecution, conceded, as I said, that if this regulation stood by itself that would be so, but he relies upon a section in the Civil Aviation Act, 1949, as giving the court jurisdiction to try this offence. The whole question which arises now for my determination is whether that section upon its true interpretation does have the effect which the prosecution contends for it. It is section 62 in the "General" part of the Civil Aviation Act, the marginal note is "Jurisdiction," and it reads as follows: "Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

That is to say, that if an offence is committed on a British aircraft then, if the aircraft lands down at London Airport and the prisoner is there arrested, the offence can be deemed

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to have been committed in London. That is the effect which the prosecution contend that the section has.

Learned counsel for the defence submit that the section is dealing only with the question of venue, or with the question of what court has jurisdiction to try an offence that has already been committed. If the prosecution is right, they say, then this section must be construed as a section which itself creates the offence. That must be, the defence submit, the construction which has to be put upon it if the prosecution is to succeed in its argument, because without this section it is conceded that there is no offence. The true meaning of the section, however, the defence allege, is that it is only dealing with matters that are already offences by virtue either of some other statute or of some other provision of the law; if you get such an act that is already an offence, then what the section is doing is simply providing for the venue. Thus (according to the defence) the section is really only procedural, saying: "Here is an offence committed in a British aircraft; the British aircraft may be anywhere in the air at the time when the offence was committed—it may be over several countries, it may be over the high seas, it may be over several counties in England—and the question is bound to arise what is the proper venue for the trial and which courts have jurisdiction." That is the problem and the only problem, the defence say, which this section is designed to solve.

That is the issue, therefore, between the parties. Stated in that way, it becomes a point of very great importance, far exceeding the importance of the enforcement of the Dangerous Drugs Regulations, important though they may be. The prosecution submit that, if this section has not got the meaning which they contend that it has, there is no law on board a British aircraft; that those who are in it may do what they like with impunity so far as English law is concerned, because (with a few exceptions) section 62 is the only section which applies the British criminal law to acts done in British aircraft. They point to the inconvenience of any construction which, in effect, means that people could behave

in British aircraft with impunity. The defence, on the other hand, say that if the prosecution is right it applies the whole of the British criminal law to British aircraft; that means that, irrespective of his nationality, anybody who happens to be on board the aircraft, even perhaps when it is grounded for several days, has to be treated as if he had committed an act in this country and so might unwittingly offend against numerous regulations which now govern our lives about which he cannot possibly know. For example, the defence submit that if a foreign doctor were taking a drug from one point to another in a British aircraft abroad—perhaps for some urgent medical purpose—yet he would commit an offence in this country because, although a duly qualified medical practitioner in his own country, he would not be duly qualified here and so not "generally authorised" to have possession of the drug.

These are the contentions on each side. It is, as I say, a point of considerable importance and one which does not seem to have been decided before. It is not very satisfactory that it has to be decided now on motion, and summarily, because jurors and witnesses are waiting to proceed with the trial, if trial there is to be, and that if it is decided in favour of the defendants, no appeal lies. That is not a very satisfactory position, but it is part of the necessary procedure; therefore I must decide it, summarily, having had much assistance from the arguments of learned counsel in the case.

I think that it is convenient before I look again at section 62 that I should consider the general background of the law against which, as it were, it has to be construed. I have had a number of statutes and cases cited to me which show what the position is in relation to offences that are committed abroad on foreign land. I think that the position is conveniently summarised in Archbold's *Criminal Pleading, Evidence and Practice*, 33rd ed., at p. 28, where it says this: "No British subject can be tried under English law for an offence committed on land abroad, unless there is a statutory provision to the contrary. . . . A foreigner is not

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liable under English law for an offence committed on land abroad." That is the position under common law. Various statutes have modified the general principle so that English criminal law may apply to acts done abroad in specific cases. I shall refer to one which I can take as an example, the case of murder. There it is provided by s. 9 of the Offences against the Person Act, 1861: "Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in any county or place in England . . . in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place . . ."

Generally speaking, even where the jurisdiction is extended by statute, it applies only to British subjects, whereas the contention of the prosecution here is, and must be, that it applies to every person on a British aircraft whether he be a British subject or not.

How far does Englisn criminal law apply to British ships which are outside this country? The position is dealt with generally, and sufficiently for my purpose, in Archbold, at p. 33, where the learned author says this: "By 28 Hen. 8, c. 15 (Offences at Sea Act, 1536), s. 1, it was provided that treasons, felonies, robberies, murders and confederacies thereafter committed in or upon the sea, or in any other haven, river, creek, or place, whereon the Admiral had or pretended to have jurisdiction should be inquired of, etc., in such shores and places in the realm or should be limited for that purpose by the King's commission."

Then the learned author goes on to set out various other

statutes which have applied the same method of trial principally to cases of piracy and so forth. Moreover all the Criminal Law Consolidation Acts of 1861 made provision for the trial of offences which were within the jurisdiction of the Admiralty to be tried as if they had been committed on land in England and to be dealt with in any county or place at which the offender should be apprehended or be in custody in the same manner as if the offence had been committed in that county or place. I have not noticed any case in which a statutory regulation of this sort has been applied to a British ship.

This is the position so far as foreign land is concerned and so far as British ships abroad are concerned. The similar problems that arise in relation to British aircraft are all left to be settled by section 62. The prosecution submit that, unless the section is given the meaning which they contend it should have, it is virtually meaningless. For, they say, at common law no act done outside England is an offence against English law. Statutes which provide for giving the court jurisdiction in the case of crimes committed on land abroad are immaterial, because unless the aircraft happened to be touched down at the time, the act is not committed on land. The defence largely accept this; but they say that there are one or two statutes which are phrased widely enough to create an offence to which on their construction of it section 62 could apply. The Treachery Act, 1940, is one which makes specific provision for an offence committed on British aircraft. The earlier part of the Act lays down the offence of treachery, and section 4 says this: "This Act shall apply to anything done . . . (c) by any person in the United Kingdom, or in any British ship or aircraft, not being a Dominion ship or aircraft"; and s. 3 (3) provides: "A person charged with an offence against this Act who is in the United Kingdom may, whether or not the offence was committed in the United Kingdom or in a British ship or aircraft, be taken in custody to any county or place in the United Kingdom,

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and may be proceeded against, indicted, tried and punished in any county or place in the United Kingdom, as if the offence had been committed in that county or place, and for all purposes incidental to or consequential on the trial or punishment of the offence it shall be deemed to have been committed in that county or place."

Other examples are further to seek. Mr. Foster cited, as I think the best he could do, the case of bigamy, which is not a very convincing one, since bigamy is hardly a crime which is likely to be committed in the course of an air flight. The statute (section 57 of the Offences against the Person Act, 1861) provides: "Whosoever, being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony . . ." and there the word "elsewhere" might well be wide enough to cover the offence committed in a British aircraft. I see no reason why it should not be, and indeed I see no reason, although the point has not been argued, why offences under regulation 2 of the Dangerous Drugs Regulations should not be ones to which, on any view, section 62 applies. Regulation 2 (1) provides: "A person shall not procure, or offer to supply or procure, to or for any person, including himself, whether in Great Britain or elsewhere, or advertise for sale, a drug . . ."

The prosecution say that, apart from these few statutes, section 62 is the only enactment that can make a criminal act done in the air an offence. Accordingly the prosecution say that section 62 must be given a construction which is wide enough to make it an offence-creating section. Since it starts off by apparently assuming that the act to be considered is an offence before the words of the section operate on it—because it begins by saying: "Any offence whatever committed on a British aircraft"—the prosecution say the word "offence" must be construed as if it read "any act which if done in England would be an offence." No doubt so wide a construction would sustain the prosecution's submission.

. The defence say that that construction is not permissible. They point to the large number of statutes (some of which I have already cited) which make that sort of provision in specific terms, saying that an act committed in such-and-such a place should be treated in the same way as if it had been an act committed in England or in the place where the man was apprehended or tried. Those are the sort of words, Mr. Foster submitted, that are used by the legislature when it intends to achieve the result the prosecution contends for here; such words are not present in this Act. As another example, the defence refer to the Criminal Justice Act, 1948, s. 31 (1), which provides: " Any British subject employed under His Majesty's Government in the United Kingdom in the service of the Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment, shall be guilty of an offence of the same nature, and subject to the same punishment, as if the offence has been committed in England."

The defence also pray in aid in support of their narrower construction the provisions of section 60 of the Civil Aviation Act, 1949, which provides: " Any offence under any enactment to which this Part of this Act applies or under an Order in Council or regulation made under either any such enactment or this Part of this Act shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be." Here similar words to those in section 62 are used, the defence submit, in a section which clearly is not doing more than providing for venue, because the offence there is not an offence that is created by the section; it is specified as an offence which is created under any enactment to which this part of the Act applies or under any Order in Council or regulation.

Those are the contentions on either side, and both sides, as I say, place great reliance on the inconvenience, and worse than inconvenience, that would be caused if the view on the

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other side were accepted. It is most unsatisfactory if there is to be complete lawlessness on British aircraft, but, on the other hand, it can hardly be satisfactory if a foreigner travelling from one place to another, thousands of miles from England, is to be held liable for infringing regulations about which he cannot have any possible knowledge at all. Where inconvenience is alleged on both sides, the only safe course, and perhaps the only safe course in any event, is to look at the words of the statute and apply strict grammatical construction. I say "strict" construction, because this is a statute which, in the submission of the prosecution, is itself creating a criminal offence where no criminal offence would otherwise be, and also because it is a statute which is, if the prosecution are right, stretching the jurisdiction of the English courts to acts done abroad by persons who are not subjects of the Queen. Both those considerations make it proper that a strict construction should be applied to the words of the statute.

In my judgment, if the prosecution is to succeed, it can only succeed if a very free construction is applied to the words of the statute. It can only be if, as I say, in lieu of the words. "Any offence whatever," there is read: "Any act which if done in England would be an offence." That is a free construction. It is not a construction which emerges from the grammar of the Act and it is not one which I find myself willing to accept. I think what the Act appears to postulate is this, that you must inquire before you operate the section at all whether any offence has been committed; if it has been, then the section determines the place where it should be tried. But if it is to be conceded, as it is in this case, that apart from the section no offence has been committed, I think it must follow that the section has no operation at all.

Having reached this conclusion, I wish to make it clear that I do not think that it necessarily means that any act that is committed on board a British aircraft cannot be made

subject to British criminal law. I propose to explain the distinction that I have in mind, not only because I must satisfy myself that this case does not fall within it, but also because it would be most undesirable if it were thought it necessarily followed from this decision that anything could be done on board a British aircraft with impunity.

There is a distinction, in my judgment, between what I may call the nature of an offence and the ingredients which have to be present before an offence is committed at all on the one hand, and, on the other hand, the question of what courts are to assume, or are to be given, jurisdiction when the offence has been committed. I can perhaps explain the distinction more easily in relation to civil law than in relation to criminal law. Take the case of trespass that is committed to land abroad. There is no doubt that the courts of England will not exercise jurisdiction over such a trespass. But if you examine the cases, which I have not had time to do, you may well find that the grounds upon which the English court refrains are not that the act is not a trespass, but that it is not a trespass over which the court will exercise jurisdiction. What the court is saying in effect is: " Yes, certainly this is a trespass, but because international comity requires it, the court will curtail the jurisdiction which it might otherwise exercise." If that is the right view, then the position is that a trespass has been committed, the offence is there, but the court will not assume jurisdiction over it.

A similar distinction may be made in criminal law. In a crime that is the creation of statute, you must look to the terms of the statute for a definition of its nature; and if the effect of the statute is limited territorially, then so is the nature of the crime. But crimes conceived by the common law—which are mostly offences against the moral law, such as murder and theft—are not thought of as having territorial limits. They are universal offences. Murder is a crime whether done in France or in England; but, if done in France, the English courts would not under the common law assume jurisdiction to punish it because that would be an infringement

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of French sovereignty. It looks as if this principle was at the back of the application of English law to English ships on the high seas. It will have been observed from the terms of the old statute which I quoted—the statute of 1536—that it does not say that certain things which if done in England would be treasons, felonies, robberies, and so on, were also to be treasons, felonies, robberies, and so on, if committed upon a British ship. The statute was assuming that they were felonies and that the only question was whether the Admiral had jurisdiction over them.

A distinction may, therefore, be drawn between the sort of situation where an act is to be regarded as an offence wherever it is committed and the sort of statutory offence which is created only in relation to a particular place. Murders are offences against the moral law in the broad sense wherever they are committed. But if a statute provides that something may not be done in a public house, it is an offence only if it is committed in a public house. No one would treat it as an offence everywhere and say that the court assumes jurisdiction over it only if it is committed in a public house. In the same way, if a statute says such-and-such a thing shall be an offence if done in the County of Middlesex, it is an offence only if committed in the County of Middlesex and not an offence if committed anywhere else : again it is not a question of assuming jurisdiction only if it is done in Middlesex; it is a case of the statute that creates the offence making it an offence only within limits. Where limits are imposed as to place or in some other form, the limits prescribe the nature of the offence. Broadly speaking you can, therefore, distinguish between offences which, as I say, are offences against the moral law, and to be regarded as wrong wherever they are committed, and offences which are merely breaches of regulations which are made for the better order or government of a particular place such as a public house, or a particular area such as the County of Middlesex, or a particular country such as England.

Now with regard to the offence charged here—whatever

may be the position in regard to other statutory offences—it is perfectly clear that this offence is an offence only if it is done in England. As I say, apart from section 62 of the Act of 1949 that is conceded, and it is abundantly plain from the provisions of regulation 3 of the Dangerous Drugs Regulations, 1953, itself. In the first place it has to be construed in contrast to regulation 2, which I have already read, which makes certain things an offence whether in Great Britain or elsewhere. Secondly, it is quite plain that, if one looks at the terms of the general authorisation under regulation 3, they are terms which contemplate that the section is to have effect simply in Britain. The persons who are allowed to be in possession of it are all persons one would normally expect to be in Britain and who can get their qualifications for being in possession of it only in Britain. Duly qualified medical practitioners must mean those duly qualified according to English law; veterinary surgeons are specifically set out and must mean those who are registered under the Veterinary Surgeons Act, 1948, and authorised sellers of poisons must mean authorised by some English law and so on. One can go through the list to show that it is abundantly plain, as it is indeed conceded, that this by its nature is only an offence if the act done takes place in England. That is the concession that is made, and very properly made, for the contrary could not be argued.

In my judgment, that concession is decisive in this case. Under section 62 you must examine, first of all, the act alleged; you must proceed on the basis that the section does not itself create any offence. You must examine the act alleged and ask yourself before you apply the section: "Is this act an offence committed on a British aircraft?" In the case of theft the answer might well be yes; for theft in the eyes of the law may be an offence wherever it is done and, therefore, an offence on board a British aircraft. Then the only question is whether the English courts are to have jurisdiction over an act which is an offence wherever it is done and section 62 says that they are. But if you find in the case of a statutory

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offence, as here, that it is an offence only if it is done in Great Britain, then it is not an offence if it is committed on a British aircraft that is not in Great Britain, and consequently the section does not apply at all.

I am not saying that section 62 applies to offences at common law. I have not heard that point argued and it may have to be argued hereafter. What I am saying is that section 62 does not apply to a statutory offence which by the terms of the statute that creates it is local and not universal in character.

I am saying also that whereas Mr. Humphreys has properly conceded in this case that by the statute which creates the offence here charged, it is an offence only if done in Great Britain, it does not necessarily follow that the prosecution will make a similar concession in respect of offences such as theft and murder, and so on, that may arise hereafter and may have to be dealt with. I wish, therefore, to make it clear that the decision which I have given is a decision which is to be regarded as applying to the particular offence which I have had to consider under the Dangerous Drugs Regulations.

For the reasons which I have given I shall quash the indictment. I do not do so on the grounds that I have no jurisdiction to try it, because I think this court has got jurisdiction to try offences that are committed on British aircraft, and I think that is the effect of section 62. But I do so on the ground that this is not an offence committed on a British aircraft, because the regulation creating the offence does not apply to acts done on British aircraft outside England. Accordingly, it follows that the depositions do not show or disclose that any criminal offence has been committed, and therefore the committal is bad, and on that ground I quash the indictment.

Indictment quashed.

Solicitors: Theodore Goddard & Co., for the first defendant; Lewis Silkin & Partners, for the second defendant; J. H. Milner & Son, for the third defendant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS, MR. JUSTICE LYNSKEY, MR. JUSTICE DONOVAN AND MR. JUSTICE HAVERS

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Reference by Home Secretary—Reception of Fresh Evidence—How Far Court Bound by Ordinary Rule of Practice Relating to Appeals—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 19 (*a*)—*Criminal Appeal Rules*, 1908 (*S.R. & O.* 1908, *No.* 227), *s.* 48.

In a reference to the court under section 19 (*a*) of the Criminal Appeal Act, 1907, the court is not bound by the ordinary rule of practice relating to appeals not to receive fresh evidence unless it is shown that the evidence could not have been produced at the trial, or that some point which could not have been foreseen arose at the trial on which the evidence would have been material. Each case must be decided on its own merits, and the court will not treat itself as bound by the rule of practice if there is reason to think that to do so might lead to injustice or the appearance of injustice.

Reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907.

Victor George Sparkes (hereinafter called " the appellant ") was convicted at Surrey Quarter Sessions on April 25, 1952, of conspiring to break and enter a dwelling-house and to steal, and of housebreaking and larceny and was sentenced by the Deputy Chairman to five years' imprisonment. Before he had finished serving that sentence, he petitioned the Home Secretary, alleging that he had been wrongly convicted, and the Home Secretary referred the case to the Court of Criminal Appeal.

The appellant was convicted, together with one Albert Charles Burley, upon an indictment containing two counts. The first count charged them with conspiring between March and November, 1950, with one McLeod and other persons

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unknown, to break and enter a dwelling-house of the Duke and Duchess of Sutherland and steal their jewellery. The second count charged them with breaking and entering that dwelling-house on November 4, 1950, and stealing jewellery. The jewellery was worth some £50,000 and none of it was recovered. The appellant and Burley pleaded Not Guilty. The jury found them guilty on both charges. Sparkes and Burley were each sentenced to five years' imprisonment on each charge, the sentences to be concurrent. Both prisoners appealed to the Court of Criminal Appeal, and their appeals were heard and dismissed on July 21, 1952. Burley later died in prison, having presented no petition to the Home Secretary alleging that he was wrongly convicted. The appellant served his sentence, but just prior to his release presented such a petition dated August 27, 1955, supporting it with the production of his passport in force in 1950. The passport purported to show that the appellant was absent from the United Kingdom between July 13, 1950, and October 19, 1950. It was not a complete record of the appellant's movements, for it showed him entering Italy at a place on the French-Italian border in September, 1950, but bore no stamp showing that he left France on the same day. Again, when he left Italy, apparently on September 11, 1950, from the same place on the border, there was no record in the passport of his entry into France.

Sebag Shaw, for the appellant, asked leave of the court to produce the appellant's passport to prove that at the material time he was out of England.

The Attorney-General (*Sir Reginald Manningham-Buller Q.C.* (*John C. Phipps* with him)), objected to the passport being produced by way of fresh evidence on the ground that at the time of the trial it was in the possession of the police and could have been produced by the appellant, and asked the court to follow the ordinary rule of practice and refuse to receive fresh evidence which was available at the trial.

The court decided that, in the circumstances of the case, the passport should be produced in evidence.

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At the end of the hearing on April 16, the court announced that the appeal would be dismissed, and that reasons for their decision would be given at a later date.

Cur. adv. vult.

April 23. The judgment of the court was read by

DONOVAN J.: This matter comes before the court upon a reference by the Home Secretary under the provisions of section 19 (*a*) of the Criminal Appeal Act, 1907.

By rule 48 of the Criminal Appeal Rules, 1908, it is provided that, upon such a reference, the petitioner whose case is so dealt with shall be deemed for all the purposes of the Act or the Rules to be a person who has obtained from the court leave to appeal, and the court may proceed to deal with his case accordingly.

[His Lordship, after referring to the facts and the entries on Sparkes' passport as set out above, continued:]

For the purpose of this appeal these discrepancies [with regard to the passport] may be ignored, and the court will assume that the appellant was abroad from July 13, 1950, to October 19, 1950. Upon receipt of the appellant's petition, accompanied by his passport, the Home Secretary exercised his powers under section 19 (*a*) aforesaid to refer the matter to this court.

Two observations may be made at once. The first is that the period July 13, 1950, to October 19, 1950, is shorter in length than the period charged in the indictment as covering the time when the conspiracy was hatched. The period alleged in the indictment was "between March and November, 1950." The appellant was admittedly in this country during 1950 between March and July, and again from October 19 till December 21. The second observation is that he was admittedly in this country on the date of the robbery, which was November 4, 1950, and for a fortnight beforehand. Plainly, therefore, the fact that the appellant was abroad from July 13 to October 19, 1950, did not make it impossible for him to

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commit the offences of which he was found guilty, and the contrary is not contended by him. What is said on his behalf is this: that if he was abroad for the period July to October, then certain evidence given against him at his trial could not be true; and if the jury had known this, they might well have acquitted him instead of convicting him as they did.

The evidence referred to was that of one Duncan McLeod. McLeod began employment as butler to the Duke of Sutherland in March, 1950, and was still his butler at the time of the robbery. The appellant had also been in the Duke's service in 1950 and earlier, as a chauffeur-valet, but he left in April, 1950. McLeod stayed on in the Duke's service, and in his evidence said that he saw the appellant frequently after April, 1950, and had drinks with him in London and Guildford. Inquiries made by the police immediately after the robbery on November 4, 1950, led to no arrests. But in February, 1952, McLeod went to the police and made a full confession. In summary it was that he, the appellant, and one Burley had planned the crime. He said that at one of his meetings with the appellant after the latter had left the Duke's employ he was asked by the appellant and by Burley to assist in the proposed robbery by giving necessary information about the lay-out of the house, and the Duchess's movements, and after consideration he agreed to do so. He was promised £8,000 as his share of the proceeds by Burley, but after the robbery he was told there was a hitch and it would be £1,000. In fact he received £800 only in all, the first £50 of it, he said, from the appellant. He went on to describe how a week before the robbery he was told by the appellant and Burley that it was to take place on the following Saturday evening, and he gave information as to what room the Duchess would be using, where in the room the jewels would be, and he agreed to unfasten the latch of the window, which in fact he did. He had confessed, some sixteen months after the crime, through remorse. The jury at the trial, after being warned of the risks involved in acting upon the evidence

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of an accomplice, obviously accepted McLeod's confession as true and convicted both the appellant and Burley.

In the course of McLeod's examination-in-chief, the following questions and answers appear:—" (Q) Can you tell us about what date it was, the month of that year, that you first met Burley? (A) I should think it was the latter part of August or the beginning of September. (Q) Now on the other occasions when you met him, what were the circumstances? (A) We used to go for drinks together. (Q) You and who else? (A) Sparkes. (Q) And Burley? (A) Yes. (Q) On those occasions when you went for drinks together, who paid generally? (A) Burley, usually. (Q) Now on one of those occasions was any suggestion made to you by either of the two men? (A) Yes. (Q) First of all, who made the suggestion? (A) Sparkes made the suggestion. (Q) In the presence of Burley or not? (A) No. (Q) Where was the suggestion made by Sparkes? (A) At 14, Cheyne Walk. (Q) And about what date was that: can you give it approximately? (A) I should think it was in September, if I remember rightly. (Q) What was the suggestion that Sparkes made to you in Cheyne Walk about September? (A) He asked if I would give some information which would help in stealing my employers' jewels." . . .

" (The Deputy Chairman): Now do you know which of the defendants mentioned £8,000 as your share? (A) Burley. (Q) Was that in Sparkes' presence or not? (A) I cannot remember whether Sparkes was there, not definitely. (Mr. Phipps): Were you ever visited by either of them at the house at Wilton Crescent? (A) I was. (Q) By which of them? (A) By Sparkes. (Q) Can you give us the month of that visit? (A) I should think it would be either the latter part of September or the beginning of October."

What is now said on behalf of Sparkes is that since his passport shows that he was out of the country in August and September the evidence of McLeod to the effect that he met the appellant in August or September cannot be right; and had this been brought out at the trial, McLeod's reliability

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as a witness would have been so shaken that the jury might well not have believed him at all; and it being McLeod's evidence which convicted the appellant, the conviction should now be quashed. If one assumes in the appellant's favour that the passport had been produced at the trial, or that the appellant himself had averred (which he did not do) that he was abroad from July to October, 1950, and that the result was that the jury believed McLeod to be mistaken when he spoke of August or September as being, to the best of his recollection, the dates of his meetings with the appellant, there is still no reason to think that the result of the trial would, or might well, have been different. In the course of the appellant's cross-examination it was elicited that more than one statement had been made by McLeod to the police; and in re-examination one of these statements, made on February 23, 1952, was made an exhibit and verified by McLeod. Part of it read thus: "I now remember that on the Sunday prior to Saturday, November 4, 1950, 'Mike' Burley and Sparkes came down to Sutton Place by car. Sparkes had 'phoned me earlier and made the arrangement. We met outside the gates of Sutton Place and we drove to the Bell public-house, Guildford, where I was introduced to two women, one as Mrs. Burley and the other a girl named 'Barbara,' who was Sparkes' girl friend. After leaving this public-house, while we were outside, I told both Burley and Sparkes that the Duke and Duchess of Sutherland would be coming down to Gardens Cottage, Sutton Place, on the following week-end. During the week following this I met Sparkes and 'Mike' Burley in the Horse and Groom public-house round the corner from 33 Wilton Crescent and I then confirmed the fact that the Duke and Duchess of Sutherland would be visiting Sutton Place on the following week-end. I gave them the information as to where the ladder was kept and which room the Duchess would be sleeping in at Gardens Cottage. In fact I told them everything about the arrangements. Burley then told me that they would come down after dinner on the Saturday and that when I left the house to drive the grey van up to the garage

at the big house they would know that the staff had left. They asked me to unfasten the catch of the Duchess's bedroom window to make it easier for them to enter the room and I agreed to do this. Sparkes telephoned me some time on the Friday and told me that the job was coming off on the following night and I agreed to carry out the prearranged plan. The following day which was Saturday, November 4, 1950, I remember this because it was 'firework' night on this day. I carried on with my normal duties. Dinner commenced that evening about 8 p.m. and after one of the courses I went upstairs to put the Duke's things out in his bedroom (that was my normal practice) and while I was there I went through to the Duchess's bedroom and unfastened the catch on the bedroom window and then looked to see if the Duchess's jewel cases were in their normal place at the head of the bed and they were. I had previously told Burley and Sparkes that the jewel cases would be in that position in the bedroom because the Duchess had always put them there on previous occasions. After this I went back downstairs, carried on with my duties and after finishing my work I left the cottage by the back door with the cook and drove the grey van up to the big house. I did not go back to the cottage again that night. About midnight that night the night watchman woke me up at the big house and told me that there were burglars at the cottage and I was wanted there straight away. I dressed and went to the cottage where I was seen by the police. I did not see 'Mike' Burley or Sparkes again or hear from them until after November 17, 1950, when I left the Duke's employ and went to live at 1 Cottismore Gardens, Kensington, where I had a room and where I was employed as a butler. Sparkes knew I was going there. Shortly after November 17, 1950, Sparkes and 'Mike' Burley came round to 1 Cottismore Gardens, Kensington, to see me. We all went to 'The Connoisseur' Club. The conversation then was general, about the job going off all right and they told me they would be giving me a share of the money later. On a previous occasion when the job was being arranged, Burley

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told me my share would be £8,000, but later he said that a 'snag' had occurred and my share would be about £1,000. He told me this when we were discussing the possibility of a reward being offered. About Christmas 1950, Sparkes handed me £50 in £1 notes and at intervals I have received from him or Burley various amounts in £50 and £25 lots, amounting in all to about £800."

There is nothing in this statement which can be criticised as faulty recollection on the part of McLeod on the ground that the appellant was out of England at the time. He was admittedly in England, and he admittedly met McLeod and Burley at Guildford, though he puts the date at October 21 and not October 28. Even, therefore, had the jury concluded that McLeod had been mistaken in his somewhat tentative recollection of earlier dates, they might well have concluded (and we think probably would) that he was telling the truth when he gave this detailed and circumstantial account of the meeting and of other events very shortly before the robbery —a meeting which Sparkes did not deny, though he put the date of it a week earlier. In the face of this evidence it is impossible to say that, if McLeod had been shown to be wrong in his reference to meetings in August or September, the jury would or might well have acquitted the appellant.

One obvious question is why the appellant did not produce his passport at the trial. It was in the hands of the police, but was nevertheless available to him at the hearing had he called for it. He could also have given evidence himself that he was abroad during the summer of 1950. He did not do so, and his explanation is that he forgot. It is impossible to believe this. He had been abroad for substantial periods in 1947, 1949, 1950 and 1951, if his passport accurately records his movements. Questions were put to McLeod by the appellant's own counsel to the effect that the appellant was abroad from June to August, 1951, and this information presumably came from the appellant. Could he in all the circumstances have forgotten that he was abroad during 1950 as well, when this was apparently the regular pattern of his

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life at that time? One possible reason for the appellant's reticence at the trial is that he realised it would not really help him to allege and establish that he was abroad from July until October 19, for this would not get rid of the damning evidence which McLeod could and did give about what happened at the meeting of the appellant with McLeod and Burley later in October. But the court need not speculate upon the matter; it is enough to say that the appellant has given no acceptable reason why at the trial he did not mention his absence abroad from July to October 19, 1950, but remained silent about it.

That circumstance led the Attorney-General to object to the court receiving the appellant's passport in evidence. He relied upon the well-established rule of practice that the court will not receive fresh evidence unless it is shown that that evidence could not have been produced at the trial, or that some point which could not have been foreseen arose at the trial upon which the evidence would have been material. The present is admittedly not such a case; and the Attorney-General argued that, since the reference from the Home Secretary is to be treated in all respects as an appeal, the rule of practice precluded the reception of fresh evidence in the shape of the passport. In the case of McGRATH, however, [1949] 2 All E.R. 498, the court indicated that different considerations arise where a case is referred to it by the Home Secretary under section 19 (*a*) of the Act, and in the circumstances of that case admitted fresh evidence. A similar course was followed in the case of COLLINS (1950) 34 Cr.App.R. 146, but no general rule applicable to all such cases is to be deduced from these precedents. On the one hand, it might well be undesirable to stultify such a reference at the outset by a refusal to receive evidence which was available at the trial. On the other hand, it is clearly undesirable to encourage astute criminals dishonestly to by-pass the court after the conviction in the hope that fresh evidence, genuine or otherwise, might be got before the court as the result of a petition to the Home Secretary, and a reference of the

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matter by him to the court. Each case must, therefore, be decided upon its merits, though the court will not treat itself as bound by the rule of practice, if there is reason to think that to do so might lead to injustice or the appearance of injustice. In the present case the court thought it better to look at the agreed schedule of entries in the appellant's passport, lest the impression might arise that a review of his case had been refused for a reason which was merely procedural.

One final point should be mentioned. It may be that the appellant personally did not break and enter the house and steal the jewels. It was not necessary to the Crown's case to prove that he did. If he conspired with Burley to steal them, as the jury found he did, then as an accessory before the fact he was just as guilty of the breaking-in and stealing effected in pursuance of that conspiracy as the person or persons who actually and physically committed the crime; and he could be tried, convicted and punished in all respects as if he were a principal felon. (See the Accessories and Abettors Act, 1861.)

For these reasons the appeal constituted by the reference to this court was dismissed.

Appeal dismissed.

Solicitor: Irwin Shaw, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE DONOVAN

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FREDERICK GEORGE CHARLES ENOS

Sentence—Possible Remission not to be Taken into Account.

A court should pass the sentence which it thinks the gravity of the offence deserves and should not, in fixing the length of

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the sentence, take any question of remission of sentence into account.

Appeals against sentence.

The first appellant was convicted at a magistrates' court of a number of offences including larceny, larceny in a dwelling-house, and fraud on the Post-Office, and was committed to Monmouthshire Quarter Sessions for sentence, where he asked for twenty other offences to be taken into account.

In passing sentence on February 24, 1955, the Deputy Chairman said: "In order to secure . . . that you should be removed from criminal circulation for four years and eight months, owing to the provision that you automatically receive a reduction of a third of your sentence for good behaviour, we have to sentence you to seven years' concurrent . . ."

The second appellant was convicted by justices on four charges of larceny and one of obtaining money by false pretences. He was committed to Monmouthshire Quarter Sessions for sentence, where he asked for eleven other offences to be taken into account. In imposing sentence on the same day the same Deputy Chairman said: "Under the law of this country you will serve two-thirds of any sentence we pass upon you, and in order to keep you in prison and out of mischief for three years and four months we have to pass a sentence of five years' imprisonment on you . . . you will not have to serve more than five years, and if you behave yourself you will be out in three years and four months."

Henry Palmer, for both appellants:

The Deputy Chairman should not have taken into account when passing sentence the fact that the appellants might receive a remission of one-third of the sentence.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: These two cases are quite separate in that the two appellants were not indicted together. The main ground which Mr. Palmer has put forward, quite properly, to this court is that, in passing sentence, the Deputy

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Chairman said that the court had calculated how much time each prisoner would actually serve assuming he behaved himself in prison, and they sentenced the first appellant to seven years' imprisonment and the second appellant to five years' imprisonment on the footing that each would earn one-third remission.

In the opinion of this court that is not a method which ought to be adopted by a court. The business of a court is to consider what is the proper length of imprisonment to impose for a particular offence. A prisoner has no right to remission, although under the Prison Rules if he behaves himself he may get as much as a third remission. If a court sentences a prisoner to seven years' imprisonment, provided that he is not kept in prison for more than seven years, he cannot complain of false imprisonment, but if he behaves himself the Prison Commissioners can, and in most cases do, grant remission. But it is not right for a court to say to a prisoner: "We are going to sentence you to seven years' imprisonment, because we want you to be kept in prison for four years and so many months," because it is equivalent to saying: "We think the proper sentence to be passed on you is four years and so many months and not seven years." We hope, therefore, that the course which was taken by Monmouthshire Quarter Sessions in these cases will not be followed and that the court will not say that a prisoner is given a certain sentence because the court is taking into account how long he will actually be in prison.

A prisoner has a prospect and a hope of remission, but the question of remission is not to be taken into account when sentence is being imposed. It is true that in an unreported case in 1951 this court did say they had to think how long the defendant would be kept in prison. In that case the defendant, who was otherwise a man of good character, for no apparent reason, would go round setting fire to haystacks. The court said that was an exceptional case and they said they had to think what sentence he would serve because, when

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he came out again, he might be a potential danger to the community.

As a general rule, courts should not take that matter into account, but should give the sentence which they think the gravity of the case deserves. In respect of Maguire the proper sentence is five years', and in respect of Enos, three years' imprisonment.

Sentences reduced.

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Child—Corroboration—Sworn and Unsworn Evidence—Offences against Several Children—Children and Young Persons Act, 1933 (23 & 24 *Geo.* 5, *c.* 12), *s.* 38 (1).

The unsworn evidence of a child, either in relation to an offence against itself or any other offence, cannot be corroborated by other unsworn evidence of another child.

MANSER (1934) 25 Cr.App.R. 18 followed.

The sworn or unsworn evidence of a child may be corroborated by the sworn evidence of another child, whether the latter child is alleged to be the victim of the prisoner in another count in the indictment or not, but the jury should be warned that the evidence of a child relied on as corroboration as well as the evidence of a child in respect of whom a charge is made needs to be looked at with care, and if the child whose evidence is relied on as corroboration is alleged to be the victim in another count in the indictment, the jury should be told to bear that fact also in mind.

MITCHELL (1952) 36 Cr.App.R. 79 considered.

The sworn evidence, either of a child or an adult, may be corroborated by the unsworn evidence of a child, but the jury should be warned that the evidence of the latter child must be regarded with particular care.

Where offences against several children are charged in one indictment and tried together, and the evidence of each child

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deals only with an offence against itself, the jury should be warned that, because one child says that the prisoner committed an offence against him, it is no corroboration of his evidence that another child says that a similar offence was committed against him also by the prisoner; but the jury may be told that a succession of such cases may help them to determine the truth of the matter, provided they are satisfied that there has been no collaboration between the children to put forward a false story; and if the defence is that of innocent association between the prisoner and the child, the evidence of other children alleged to have been similarly interfered with by the prisoner is admissible to rebut that defence.

Appeal against conviction.

The appellant was convicted at Middlesex Quarter Sessions on March 8, 1956, on seven counts of an indictment, each alleging indecent assault on a boy, all the boys being aged about ten years, and was conditionally discharged by the Deputy-Chairman (the Hon. E. E. S. Montagu, Q.C.).

The appellant was a schoolmaster, and all the indecent assaults were alleged to have been committed by the appellant in the school at which the boys were pupils during lessons. All the boys gave evidence on oath. In his summing-up, the Deputy-Chairman gave the jury a strong warning on the importance of looking for the corroboration of the evidence of young boys, at the same time telling them that, if they fully appreciated the danger of convicting on the uncorroborated evidence of a child, they could do so, if absolutely certain that they were right in so doing. The evidence relied on by the prosecution as corroboration was twofold; in some cases a boy named as the assaulted person in a count of the indictment gave evidence that he saw the appellant commit a similar or substantially similar act to that of which he spoke on another boy named in another count. In four cases there was evidence of two boys and one girl, who were not involved in any charge, that they had seen the appellant act towards some of the boys in a manner which was alleged to constitute an indecent assault. The Deputy-Chairman gave a certificate for appeal in the following terms: "The defendant having raised the question whether the evidence of other children

than those with regard to whom offences were being alleged could afford corroboration of the evidence of complaining children (that question having been specifically left open in MITCHELL, 36 Cr.App.R. 79), and whether the summing-up with regard to that evidence was adequate and proper."

Michael Havers, for the appellant:

Courts have always warned juries of the danger of convicting on the uncorroborated evidence of a child of tender years. Such a child is, therefore, regarded as an incomplete witness, and accordingly the evidence of such a child cannot amount to corroboration, unless his or her evidence also is corroborated. There is no direct authority on this point, and the matter appears deliberately to have been left open in MITCHELL (1952) 36 Cr.App.R. 79. The only definite authority appears to be MANSER (1934) 25 Cr.App.R. 18, which lays it down that the unsworn evidence of a child cannot be corroborated by other unsworn evidence. [He referred also to BAILEY, 18 Cr.App.R. 42; [1924] 2 K.B. 300; DENT (1943) 29 Cr.App.R. 120; and HALL, 35 Cr.App.R. 157; [1952] 1 K.B. 362.]

F. H. Lawton, for the Crown:

There is no authority for the proposition that, where corroboration of the evidence of a child is required as a matter of law or practice, that corroboration cannot be afforded by the sworn evidence of another child who is not alleged to be the victim of any offence. Whether such evidence does in fact afford corroboration, and the weight to be given to it, are always matters for the jury, but the child is to be regarded for all purposes, including that of being able to afford corroboration, as a competent witness. The summing-up of the Deputy-Chairman was particularly careful and followed the well-established principle laid down in BASKERVILLE, 12 Cr.App.R. 81; [1916] 2 K.B. 658. [He referred also to the authorities previously cited.]

Cur. adv. vult.

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April 30. The judgment of the court was read by THE LORD CHIEF JUSTICE: The appellant was convicted at Middlesex Quarter Sessions on an indictment containing seven counts, each charging him with indecent assaults on boys under the age of sixteen, each of whom was about ten years old. The appellant was a schoolmaster and the case against him was that he on various occasions sat beside the boys while they were doing their lessons and felt their private parts. The court allowed the boys to be sworn. The Deputy-Chairman, in summing up, stressed more than once how important it was that there should be corroboration of the evidence of young boys and gave a strong warning on this subject, at the same time telling the jury that if they fully appreciated the danger of convicting on the uncorroborated evidence of a child they could convict, if absolutely certain that they were right in doing so. The evidence relied on by the prosecution as corroboration was twofold; in some cases a boy named as the assaulted person in a count of the indictment gave evidence that he saw the appellant commit a similar or substantially similar act to that of which he complained on another boy named in another count. In four cases there was evidence of two boys and one girl who were not involved in any of the charges that they had seen the appellant act in relation to some of the boys in a manner which was alleged to constitute an indecent assault. The jury were specifically directed that they must consider each case separately and after this direction and the warning we have already mentioned the jury convicted on all counts. The learned Deputy-Chairman gave a certificate for appeal in these terms: "The defendant having raised the question whether the evidence of other children than those with regard to whom offences were being alleged could afford corroboration of the evidence of complaining children (that question having been specifically left open in MITCHELL, 36 Cr.App.R. 79) and whether the summing-up with regard to that evidence was adequate and proper."

The main argument before us on the appeal was that as courts have always warned juries of the danger of convicting on

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the uncorroborated evidence of a child of tender years, the evidence of such a child could not amount to corroboration unless his or her evidence was also corroborated. From this, if accepted, it would seem to follow that a child's evidence would never corroborate, for if the evidence of the corroborating child had in turn to be corroborated by a person of more mature years it would follow that it would be the latter's evidence that affords the corroboration. If when child A says: "I saw the defendant assault child B," A has to be corroborated, someone would have to be called to say: "I saw what A says he saw," so there would be no point in calling A. Now in dealing with this matter it has to be remembered that for the present purpose child witnesses must be divided into two classes, those who are too young to be sworn and those who in the opinion of the court are capable of understanding the obligation of an oath. By section 38 of the Children and Young Persons Act, 1933, a child of tender years may give unsworn evidence in any proceedings against any person for any offence, but the person accused cannot be convicted unless the unsworn evidence is corroborated by some other material evidence in support thereof implicating him. The unsworn evidence cannot be corroborated by other unsworn evidence: MANSER (1934) 25 Cr.App.R. 18. It will be observed that there is no definition in the Act of what is meant by "a child of tender years," though "child" is defined as a person under the age of 14. Whether a child is of tender years is a matter for the good sense of the court, and, though it may be difficult to decide whether a child understands the obligation of an oath, a court probably would have no difficulty in deciding whether he or she was of tender years. Where then such a child gives unsworn evidence, it must be corroborated by some other evidence and we can see no reason why the corroboration should not be the evidence of another child who, in the opinion of the court, is capable of being sworn. Why, then, when a child gives sworn evidence which is not required by statute to be corroborated, should the corroboration not be that of another child? It is true that

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for very many years the courts have always warned juries that it is dangerous to convict on the uncorroborated evidence of a child, whether of tender age or not, but so also is a similar warning given in all sexual cases. In a case where the complaining party is a grown woman the jury would be advised to look for corroboration and if the evidence is that of a child, that is of one under the age of fourteen, but who in the opinion of the court can be sworn, we can find no reason for saying that such evidence could not be accepted by the jury as corroboration. To hold otherwise would mean that, if a mother was indecently assaulted in the presence of her son aged say twelve or thirteen, his evidence could not be accepted as corroboration if the jury believed him. Whether evidence that is legally admissible does corroborate is for a jury to determine. The court points out to them what can be corroboration, and then it is for the jury to decide whether it does corroborate and it is open to them to accept it or to reject it—it may be because they do not think it safe to act upon the evidence of one so young. It is, no doubt, also desirable to remind the jury that the evidence of a child, not only of one in respect of whom the charge is made but of one called to corroborate, needs to be looked at with care, but that the jury may accept it as corroboration we think is not open to doubt. Nor can we see that it makes any difference as regards admissibility that the child offered as a corroborating witness of the evidence of another is also alleged in the indictment to be an assaulted person. Each count in an indictment is equivalent to a separate indictment. Suppose, then, separate trials are ordered of counts in an indictment alleging in count 1 an assault on child A and in count 2 one on child B. The latter, provided he is sworn, could be tendered to corroborate the evidence of A and need not, and indeed could not, be asked any questions in chief as to the assault on him. In our opinion, therefore, it makes no difference whether the child called to corroborate the evidence of another is alleged to be the victim in another count of the indictment or not, though, if he is, no doubt it would be wise to warn a jury that they

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should bear this in mind and look with particular care on that evidence.

Perhaps we should say a word about the cases to which counsel on either side called our attention. It is agreed that there is no case directly in point and both counsel cited the same cases. In BAILEY, 18 Cr.App.R. 42; [1924] 2 K.B. 300, the actual decision was that the jury must return a verdict on each count in the indictment and should be warned against supplementing evidence on any one by evidence on any other, but the court did emphasise the desirability of warning the jury that they should regard the evidence of boys in these cases of indecency with great care. In GREGG (1932) 24 Cr.App.R. 13, the court pointed out that, where unsworn evidence is given, the judge ought to draw the attention of the jury to the fact that the statute requires that evidence to be corroborated, because the jury ought to approach the question of corroboration more carefully if they know that it is required by an express statutory provision and not merely by the ordinary rule of common sense and fairness which makes it desirable that the evidence of young persons should be corroborated. The oft-cited case of DENT (1943) 29 Cr.App.R. 120 in fact lays down no particular principle. It was a case in which the judge had given a proper warning as to the danger of convicting without corroboration, but the jury had none the less convicted. On a review of the evidence the court thought that the verdict was unreasonable and accordingly exercised the power given by section 4 (1) of the Criminal Appeal Act, 1907, of quashing the conviction. In MITCHELL (1952) 36 Cr.App.R. 79, the case referred to by the learned Deputy-Chairman in the certificate which he granted, the question which seems to have been left open is whether the jury should always be warned of the danger of accepting the evidence of a child of tender years in the absence of corroboration, although the child is not giving evidence in regard to an assault on him or her self. It will be remembered that in that case the court was not dealing with the unsworn evidence of a child, but in stating the question that was left open we think

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the court must have been referring to unsworn evidence, as they specifically mention the evidence of a child of tender years. We, therefore, have to consider the case of a child of tender years being called to give unsworn evidence in regard to an offence committed against some other person or against property. Inasmuch as the statute which permits a child of tender years to give unsworn evidence expressly provides for such evidence being given in any proceeding against any person for any offence, it appears to us that the unsworn evidence of a child can be given to corroborate the evidence of another person given on oath. At the same time it would be obvious that a jury should be warned that such evidence must be regarded with great care, but in view of the terms of the section it seems to us that the evidence is admissible, but its weight is for the jury.

To sum up, the unsworn evidence of a child must be corroborated by sworn evidence; if then the only evidence implicating the accused is that of unsworn children, the judge must stop the case. It makes no difference whether the child's evidence relates to an assault on him or her self or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article. The sworn evidence of a child need not, as a matter of law, be corroborated, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult. The evidence of an unsworn child can amount to corroboration of sworn evidence, though a particularly careful warning should in that case be given. As proper warnings were given by the learned Deputy-Chairman in this case, there is no ground on which we can interfere with the conviction.

As we are endeavouring in this judgment to deal comprehensively with the evidence of children, we may perhaps endeavour to give some guidance to courts who have from time

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to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault, though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter, provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of SIMS, 31 Cr.App.R. 158; [1946] K.B. 531, subsequently approved on this point by the House of Lords in HARRIS *v.* THE DIRECTOR OF PUBLIC PROSECUTIONS, 36 Cr.App.R. 39; [1952] A.C. 694, shows that such evidence can be given to rebut the defence.

This appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: Hodder & Son, for appellant.

[CENTRAL CRIMINAL COURT]

BEFORE

MR. JUSTICE DONOVAN

R. *v.* OWEN AND OTHERS

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Conspiracy—Conspiracy to Evade Regulation and to Act "To Prejudice the Interests of Honest English Traders"—No Allegation of Conspiracy to Commit Public Mischief—Validity of Indictment—Control of Goods (Import Certificates) Order, 1931 (*S.I.* 1951, *No.* 1016).

Conspiracy—Conspiracy to Defraud—Conspiracy in England to take Effect against Foreign Subjects in Germany—Right of Foreign Subjects to Sue Tortfeasor in England—Whether Conspiracy Indictable in England.

The first two counts of an indictment charged the defendants with conspiracy to commit a common law misdemeanour

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by conspiring to acquire lead, steel and copper in the Federal Republic of Germany by means of forged documents purporting to show, and by fraudulent misrepresentations, that the metals would be consigned to, used in, and not re-exported from the Republic of Ireland, when in fact they were intended to be consigned and sold to purchasers in Czechoslovakia, Poland, Rumania and the U.S.S.R., and thereby to evade the provisions of the Control of Goods (Import Certificates) Order, 1951, and to " prejudice the interests of honest English traders in such metals."

Held, (i) that, as the defendants never imported goods into the United Kingdom, they never became amenable to the Order of 1951, and therefore an indictment of conspiracy under that head could not be maintained; (ii) that the object of acting so as to " prejudice the interests of honest English traders " was relevant only to a charge of conspiracy to effect a public mischief and a conspiracy under the second head could not be maintained in the present case where public mischief was not the unlawful object alleged. These two counts must, therefore, be quashed.

Newland, 37 Cr.App.R. 154; [1954] 1 Q.B. 158 distinguished.

Counts 3 and 4 of the same indictment charged the defendants with conspiring to defraud a German export control department known as Z.A.K. by causing Z.A.K., by means of forged documents purporting to be given by the Department of Industry and Commerce of the Republic of Ireland and certifying that the metals would be imported into Ireland and would not be re-exported therefrom, to grant licences to export the metals from Germany, when the defendants well knew that the metals were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R.

Held, that a conspiracy in England to defraud foreign subjects in a foreign country in circumstances in which the foreign subjects could sue the tortfeasor in England, as Z.A.K. could in this case, was indictable in England and that these counts were good.

Trial on indictment.

The defendants, Henry Geoffrey Owen and Patrick Sidney Ernest Seth-Smith, were charged in the first and second counts of an indictment with conspiracy to commit a common law misdemeanour, by conspiring in London and elsewhere together and with other persons to acquire lead, steel and copper in the Federal Republic of Germany by means of forged

documents purporting to show, and by fraudulent representations, that the metals would be consigned to, used in and not re-exported from the Republic of Ireland, when in fact the metals were intended to be consigned and sold to purchasers in Czechoslovakia, Poland, Rumania and the U.S.S.R., and thereby to evade the provisions of the Control of Goods (Import Certificates) Order, 1951, and to prejudice the interests of honest English traders in such metals. In the third and fourth counts of the indictment the defendants were charged with conspiracy to defraud by conspiring in London and elsewhere together and with other persons to defraud an export control department of the Federal Republic of Germany known as and referred to as Z.A.K. by causing Z.A.K. to grant licences to export certain metals from the Federal Republic of Germany by furnishing to Z.A.K. forged documents purporting to be end-user certificates made and given by the Secretary of the Department of Industry and Commerce of the Republic of Ireland, certifying that such metals would be imported into the Republic and would not be re-exported therefrom, by fraudulently representing to Z.A.K. that the said metals would be supplied to and consumed by Irish manufacturers, well knowing that such metals were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R.

The indictment contained two other counts not relevant to this report charging other offences against the two above-named defendants and a third defendant.

After the opening speech of counsel for the Crown, counsel for the defendants moved to quash the first four counts of the indictment. Donovan J. ruled that the first two counts should be quashed, but that the third and fourth counts should stand, and the trial then proceeded.

Neville Faulks and *David Hirst*, for the Crown.

Christopher Shawcross Q.C. and *Sebag Shaw*, for the first defendant.

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Alexander Karmel Q.C. and *Michael Mann*, for the second defendant.

A. P. Marshall Q.C. and *W. M. Howard*, for the third defendant.

Cur. adv. vult.

May 18. The following judgment was read by

Donovan J. I now give my reasons for quashing counts 1 and 2 of the indictment in this case, and upholding counts 3 and 4.

Counts 1 and 2, in effect, alleged a conspiracy to evade the Control of Goods (Import Certificates) Order, 1951. There was at the relevant time no enactment making it an offence to do this, and if a man, considering the rules for the conduct of his affairs laid down by Act of Parliament or by statutory order, decides to conduct those affairs so that the rules do not apply, there is nothing unlawful in simply doing that. In this case, the accused, Owen and Seth-Smith, avoided becoming amenable to the Order of 1951 simply by never importing the goods into the United Kingdom, and never in consequence becoming holders or grantees of an import certificate. To the holder of such a certificate alone did the Order of 1951 apply, and however much the Board of Trade disliked the avoidance of its Order, it was not entitled to treat that as *per se* a criminal offence or as something unlawful.

The other unlawful object alleged in counts 1 and 2 was the prejudice of honest English traders. That was a phrase lifted from the recent case concerning pottery frauds: Newland and Others, 37 Cr.App.R. 154; [1954] 1 Q.B. 158. There, the charge being conspiracy to effect a public mischief, the consideration that honest English traders were injured by the conspiracy had relevance. In relation to the first two counts in this indictment, where public mischief is not the unlawful object alleged, the phrase "acting to the prejudice of honest English traders" has no relevance and is no more than mere declamation. I should add that these two counts also allege unlawful means, for example, forged documents and

fraudulent representations, but as these representations and alleged forgeries were in turn the alleged unlawful objects specified in the succeeding two counts of the indictment, there was no point in pressing counts 1 and 2 merely because they alleged unlawful means. For all these reasons I quashed them.

Count 3 of the indictment raised the question whether a conspiracy within the jurisdiction to defraud a person outside the jurisdiction by acts to be committed outside the jurisdiction is an indictable conspiracy in England. The law with regard to venue was stated by Lord Watson in the following terms, when delivering the judgment in Huntington *v.* Attrill [1893] A.C. 150, at p. 155: "The general law upon this point has been correctly stated by Story J. in his *Conflict of Laws* and by other text writers; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well-recognised principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of someone representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the courts of any other country."

Seeing that conspiracy is a crime in itself, whether or no the conspirators proceed to put their agreement into effect, then to try in this country a conspiracy having its origin in this country does not prima facie transgress the rule there stated. The question is, is there any such transgression involved in treating as indictable here a conspiracy hatched here for the doing of something unlawful abroad? The argument in favour of an affirmative answer derives its chief support from the

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anomalies to which a negative answer would give rise. Let it be supposed, it is said, that persons of Jewish race in this country, during the persecution of Jews in Germany before the recent war, agreed in this country to get some of their relatives out of Germany by means of forged passports. Would they be indictable here for a criminal conspiracy? Or if members of the Secret Service here, recently much in the news, agreed to send an agent to some foreign country with forged papers, are they similarly indictable? I recognise the force of these comparisons, and the difficulties they raise. The legal answer in each case may well be Yes. The practical answer, of course, is that the question could never arise, for no prosecution would ever be launched, or if it were, no conviction ever obtained.

On the other hand, there are anomalies the other way. Suppose two men agree in this country to inflict grievous bodily harm upon a third. At once they commit the crime of conspiracy, even if they subsequently repent. But if they agree to commit the felony in Boulogne while their victim is on a day trip there, and do so, then it is said that there is no offence triable here. The actual felony was committed abroad, and so is not triable in England, and the conspiracy escapes because, though hatched in England, the unlawful object was to be effected in Boulogne. Most people would regard that as anomalous too. One can, of course, foresee other difficulties arising out of the rather ambiguous word "unlawful," which may be given a number of meanings, and which may mean one thing here and another thing abroad. Thus there may be a conspiracy in England to do something in France, lawful there, but unlawful here, for example, unauthorised public entertainment in a public place for money on a Sunday. It would be odd to prosecute anyone here merely for agreeing to do that in France.

These difficulties make it better that I should not go beyond the actual point I have to decide and try to enunciate some universal principle which could almost inevitably be confounded at once by some particular example. What I have to decide is whether a conspiracy in England to defraud

someone in Germany is an indictable conspiracy here. If such an unlawful object were to be effected in England, the conspiracy would clearly be indictable here, for the unlawful object can be a tort as well as a crime: see Aspinall (1876) 2 Q.B.D. 48, and the judgment of Brett J. therein. I regard it as unlawful in English law to defraud a foreign subject in such a way that the foreign subject could sue the tortfeasor in this country—which I think Z.A.K. could have done, and could still do, in the present case. Then, remembering that it is the agreement which constitutes the crime, whether the unlawful object is effected or not, I cannot on principle see how the conspiracy constituted by such agreement becomes untriable here simply because the crime or tort is to be committed abroad. Logic does not compel such a conclusion. Considerations of public weal do not compel it either. It would be of no benefit to this country if it became a sanctuary for conspirators, provided only that they concluded their unlawful plots abroad. Anomalies there may be, of course, but they exist whatever the true conclusion.

There is no authority which compels me to hold the kind of conspiracy now under consideration as non-indictable here. There is none the other way either, and this circumstance is strongly relied upon on behalf of the defendants, although the absence of it may tell almost as strongly against their contention as the presence of authority would, for it may be that hitherto the matter has been treated as clear. Indeed, I notice that in Warburton (1870) L.R. 1 C.C.R. 274, which was a case of conspiracy here to defraud a person in Germany by acts to be done there, the validity of the indictment was not challenged. It is true that the question was not discussed, but considering it was the Court for Crown Cases Reserved, and consisted of Cockburn C.J. and Channel and Cleasby BB., Keating and Brett JJ., the point would scarcely have been overlooked. In any event, on principle I hold that a conspiracy in this country to defraud persons in Germany in the way alleged in this case is indictable here, and accordingly uphold counts 3 and 4.

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I might perhaps add, for the sake of the record, that the jury have convicted on count 3, and were discharged from giving a verdict on count 4, for reasons which are immaterial.

Indictment quashed in part.

Solicitors: The Solicitor, Board of Trade, for the prosecution; Stikeman & Co., for the first defendant; Galbraith & Best, for the second defendant; Claude Hornby & Cox, for the third defendant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE DONOVAN

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JOHN CABORN-WATERFIELD

Reference by Home Secretary—Ambit—Limited to Ground on which Case Referred—Criminal Appeal Act, 1907 (*7 Edw. 7, c. 23*), *s.* 19 (*a*).

On a reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907, the court limits itself to considering the ground on which the case was referred and will not consider other grounds of appeal.

Reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907.

The appellant was convicted at East Sussex Quarter Sessions on May 6, 1954, of shopbreaking and larceny and was sentenced by the Chairman to three years' imprisonment.

The appellant was originally indicted before Sellers J. at Sussex Assizes in April, 1954, together with two men named Rogers and Fricker. Rogers pleaded Guilty; Fricker pleaded Not Guilty, but was convicted; and with regard to the appellant the jury disagreed. On May 21, 1953, jewellers' premises in Eastbourne were broken into and over £1,000 worth of property was stolen. On January 8, 1954, a girl named Anne Wood went to the police and said that on the

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day of the crime she, Rogers, Fricker, the appellant and another girl named Patricia Darling had travelled to Eastbourne together and that the three men had committed the crime. She gave evidence to that effect at both trials. The appellant had always denied that he had been one of the party who went to Eastbourne. At the second trial the appellant had called Rogers as a witness to say that the appellant had not been at Eastbourne on the day in question. Fricker was not called as a witness, nor was Patricia Darling, who in the first account which she gave to the police implicated the appellant, but subsequently made an affidavit in which she said that he was not there. In July, 1954, the appellant applied to the Court of Criminal Appeal for leave to appeal against conviction, but the application was refused. Some weeks before the hearing of the reference Fricker put forward a petition to the Home Secretary for the purpose of giving information, in which he said that the appellant had not been at Eastbourne on the day of the crime, and on this ground only the Home Secretary referred the matter to the court.

Eric Myers, for the appellant:

The court is not, in the circumstances, asked to give leave for Fricker to be called as a witness on behalf of the appellant, and the appellant has instructed me not to ask for leave to call Patricia Darling. It is, however, submitted that by virtue of the reference the appellant is entitled to raise other grounds of appeal. By section 19 (*a*) of the Act and rule 48 of the Criminal Appeal Rules, 1908, the appellant is to be treated as a person who has been given leave to appeal. He is not bound by any notice of appeal, because there is none, nor by the terms of the petition, because it was not his. He is brought compulsorily before the court, but being there he has status, and it is submitted that he should be allowed to complain of misdirection and misreception of evidence by the Chairman.

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The Attorney-General (*Sir Reginald Manningham-Buller Q.C.*) (*John Phipps* with him) for the Crown:

The court should consider only the particular ground on which the reference was based.

Eric Myers, in reply:

The extent to which the court should consider itself bound by the ground of the reference is a matter for the discretion of the court.

THE LORD CHIEF JUSTICE: This is a reference by the Secretary of State under section 19 (*a*) of the Criminal Appeal Act, 1907, with regard to the conviction of a man named John Caborn-Waterfield, who was convicted at the East Sussex Quarter Sessions on May 6, 1954, of shopbreaking and larceny and sentenced to three years' imprisonment.

He was indicted along with two other men, named Rogers and Fricker. The case for the prosecution at the appellant's second trial, the jury having disagreed with regard to him at the first trial, depended entirely on the evidence of a young woman named Anne Wood, who said from the first, and has never been shaken on this point, that the appellant was a member of the party which went down to Eastbourne on the day in question when the shopbreaking was effected. Rogers and Fricker, the other two men, were convicted at the first trial, Rogers having pleaded Guilty and Fricker Not Guilty. Rogers said at the trial that Fricker was not present. Fricker now admits that he was present, although he denied it on oath at the trial, and he has said that the appellant was not present, whereas Anne Wood has all along said that the appellant was one of the four. There was another young woman in this party called Patricia Darling. The first account which she gave to the police plainly implicated the appellant as a member of the party that went down on that day. Subsequently she withdrew that by making an affidavit in which she said he was not there. Therefore, there are all these witnesses saying one thing at one time and another thing at another time. It is only right to say that the appellant always denied

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that he was there, but the jury, having heard the case, convicted him. His sentence has very nearly been served—he is due to be released in about a fortnight's time—but meanwhile for some reason into which it is not necessary to enter, though it is not difficult to think of reasons which might have prompted it, Fricker has put forward a petition to the Home Secretary in which he has said that the appellant was not one of the party, and the Home Secretary saw fit in the circumstances to refer this case to this court.

Mr. Eric Myers, who has argued the case with clarity and skill, realises that he cannot ask this court to rely on Fricker's evidence or on Patricia Darling's evidence, and he says that he has the express instructions of his client not to ask for leave to call Patricia Darling, and he realises it would be no use to call Fricker. Therefore, what is left of this reference but for Mr. Myers to go behind it and say: "As this matter has been referred, any point is open to me, and I want now to challenge the summing-up of the learned chairman and to consider the question whether certain evidence was properly admitted in the court below"? The appellant, having been convicted, applied to this court for leave to appeal and set out a variety of grounds, and the court had before it on the hearing of the application, as this court always does, the summing-up, and if the court could have found any reason for thinking that the summing-up was in any way defective, leave to appeal would have been given. The court did not give leave to appeal, but refused the application, and there was an end of it.

It is quite impossible for this court to hold that on a reference by the Secretary of State on the ground that further facts have been submitted to him which he thinks the court ought to consider in deciding whether the verdict was right, that is to say the verdict on the facts was right, this court can then increase the ambit of the reference by going again into the whole of the facts of the trial and consider points which the Home Secretary has not referred to this court at all. If there is any question or doubt about it, this court desires to say quite definitely that on a reference by the Home

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Secretary under section 19 (*a*) the court considers the grounds on which the Home Secretary has referred the case and confines itself to those grounds. We cannot go into all sorts of different grounds. If we did, as has been pointed out, there might be no end to the matter. Supposing the case had never been before the Court of Criminal Appeal at all either by means of an application or an appeal, the Home Secretary might refer the whole case because he might think there was possibly some defect in law at the trial which had been brought to his attention, and also some question of fact. The court could then go into the questions of law and fact and give its decision, and after its decision supposing the Secretary of State had some further evidence put before him which he thought might have had a bearing on the verdict, he could then refer that evidence to the court to consider whether or not it was a ground for quashing the conviction. Then, according to the argument which has been addressed to us, it would be open to the court or counsel to challenge once again the whole legal position at the trial, the summing-up and the reception of evidence which had been put before the court. The court is of opinion that when a matter of this sort is referred by the Home Secretary and we see at once the ground on which the Home Secretary has referred the case to us, this court must confine itself to that ground, and as we are not asked to hear any further evidence, it follows that the appeal, because the reference is now treated as an appeal, is dismissed.

Appeal dismissed.

Solicitors: Cohen & Cohen, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE DONOVAN

CHARLES EDWARD INGRAM

1956
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Obtaining Credit by Fraud—"Credit"—Liability to Render Money's Worth in Form of Services—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (1).

For the purpose of the offence of obtaining credit by fraud, contrary to section 13 (1) of the Debtors Act, 1869, "credit" may be obtained in incurring liability to pay not only money, but also money's worth, which may consist of commodities or services.

Where, therefore, the appellant, an electrician, had obtained contracts from a number of shopkeepers to erect or renovate electric Neon signs at an agreed price, and had in each case obtained payment of part of that price in advance, but did not do any of the work, save for insignificant matters of a preparatory nature, and did not return any of the advance payments, and was found by the jury to have acted fraudulently,

Held, that the appellant had been properly convicted of obtaining credit by fraud from the shopkeepers.

Courts should be on their guard against any attempt to abuse the section by bringing proceedings under it where there is no real evidence of fraud, but merely of procrastination.

Appeal against conviction (on certificate).

The appellant was convicted at Middlesex Quarter Sessions on April 10, 1956, on six charges of obtaining credit by fraud, and was sentenced by the Deputy-Chairman (the Hon. E. E. S. Montagu Q.C.) to nine months' imprisonment.

The appellant was an electrician, and the fraud alleged was that he had obtained contracts from a number of shopkeepers to erect or renovate electric Neon signs at an agreed price and had in each case obtained payment of part of the price in advance, but did not do any of the work; save for insignificant matters of a preparatory nature, and did not return any of the advance payments. The jury were directed that they

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were not entitled to convict unless they were satisfied that the appellant was acting fraudulently—that is to say, that he never had any intention to do the stipulated work at the time when he received payments in advance.

By section 13 of the Debtors Act, 1869: "Any person . . . shall be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any term not exceeding one year . . . (1) if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud."

C. W. R. Pickthorn, for the appellant:

In order to obtain credit within the meaning of section 13 (1) of the Debtors Act, 1869, there must be, immediately following the obtaining of credit, a liability, either present or future, to pay money to the person from whom credit was obtained. In the present case the liability incurred was to perform services or to provide materials. OSBORN *v.* BARTON (1950) 66 T.L.R. (Pt. I) 115 is an authority for the proposition that a man who obtains money in return for a promise to deliver goods does not obtain credit, but obtains money. If it is contended that it was held in OSBORN *v.* BARTON (*supra*) that the prisoner could not be convicted of obtaining credit under section 13 because his duty was to deliver the goods immediately and that, therefore, there was no period during which credit was extended, that contention ignores the decision in PETERS (1886) 16 Q.B.D. 636, where there was an immediate duty to pay and it was held (Manisty J. dissenting) that it was immaterial that there had been no stipulation of credit when the liability to pay was incurred. At page 641, Lord Coleridge C.J. treated credit "as being correlative to debt." In MITCHELL (1955) 39 Cr.App.R. 49; [1955] 1 W.L.R. 1125, where a conviction under section 13 of the Debtors Act, 1869, was quashed, Lord Goddard C.J., in delivering the judgment of the Court of Criminal Appeal, said "to obtain credit under the Debtors Act, there must be the creation of a debt and there was no creation of a debt here." In COYNE (1905) 69 J.P. 131, the prisoner induced

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parents of boys to bind the boys to him as apprentices in return for a premium of £25, and it was held that the prisoner had obtained money, not credit. In referring to that case in PRYCE (1949) 34 Cr.App.R. 21, Lord Goddard C.J. said (at p. 23): "The premiums were not returnable by the prisoner, therefore no credit was obtained." The Debtors Act, 1869, is entitled "An Act for the abolition of imprisonment for debt." Part II, in which section 13 is contained, is headed "Punishment of fraudulent debtors." In section 13 (2) "creditors" mean persons who owe money. All these considerations point to credit being confined to a liability to pay money. If in this case the appellant obtained credit, it would follow that any undischarged bankrupt who, without disclosing his bankruptcy, incurred a liability to do £10 worth of work, would commit an offence under section 155 (*a*) of the Bankruptcy Act, 1955.

J. H. Buzzard, for the Crown:

The three essential ingredients of a charge under section 13 of the Debtors Act, 1869, were clearly set out in JONES [1898] 1 Q.B. 119. In MITCHELL (*supra*) and PRYCE (*supra*) the decision that there was no obtaining of credit rested on the principle that no debt had been created. The definition of "liability" in section 3 of the Act of 1869 makes it clear that credit has a more extended meaning than that contended for by the appellant. Credit may be obtained when there is a liability to render money's worth as well as when there is a liability to pay money. In the present case, the appellant had taken upon him the liability to render money's worth in the form of services, and therefore credit had been obtained by him. The jury received a careful direction on the necessity of fraud being proved by the prosecution and their verdict means that they were satisfied that fraud had been proved. The offence, therefore, was complete.

Cur. adv. vult.

June 8. The judgment of the court was read by DONOVAN J.: The appellant was convicted at Middlesex

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Quarter Sessions on April 10, 1956, on six charges of obtaining credit by fraud contrary to section 13 (1) of the Debtors Act, 1869, and sentenced to nine months' imprisonment. He appealed to this court, pursuant to a certificate granted to him by the Deputy-Chairman, and contended that the facts proved at the trial disclosed no obtaining of credit on his part, and that accordingly his conviction was bad in law. At the conclusion of the hearing on June 4 last the court dismissed the appeal, and now gives its reasons for so doing.

The appellant is an electrician, and the fraud alleged against him was this: that he obtained contracts from a number of shopkeepers to erect or renovate electric Neon signs at an agreed price. He obtained payment of part of that price in advance, but did not do the work save for insignificant matters of a preparatory nature. He was in financial difficulties, and none of the advance payments was returned.

The jury were properly directed that they could not convict the appellant unless they were satisfied, *inter alia*, that in obtaining these advance payments and then failing to do the work he was acting fraudulently, that is to say, that he never had any intention to do the stipulated work at the time when he received payments in advance. The jury, influenced, no doubt, by what appeared to be a systematic course of conduct on the appellant's part, convicted him, and it must accordingly be taken that they found that when he received part payments at the outset he had no intention to do the work he had undertaken to do. On any view, therefore, his conduct was fraudulent, but he argues that it involved no obtaining of credit and thus no offence under section 13 (1).

The requisites for an offence under that section are these: First, that the accused person has obtained credit. Second, that he obtained it under false pretences or by means of any other fraud. Third, that he obtained it in incurring any debt or liability. The appellant admits that he incurred a liability in these transactions, namely, a liability to do the work. He argues, however, that when he received the various payments in advance he obtained no credit, for what he had to do in

return was not to pay money in the future, but to do work. In other words, there can be no obtaining of credit, he says, unless the obligation towards the person who has given credit is to pay him money in the future. It is not sufficient if the obligation is to pay him money's worth only, either in the shape of goods or services.

Considerable light is thrown upon the problem by the statutory definition of the word " liability " in section 13 (1). That definition comes in the first place from section 3 of the same Act, where it is provided that " words and expressions defined in the Bankruptcy Act, 1869, shall have the same meaning in this Act."

By section 31 of the Bankruptcy Act of 1869 the word " liability " is defined. It is to include any compensation for work or labour done and any obligation or possibility of obligation to pay money or money's worth on a breach of contract: and, generally, " any express or implied engagement, agreement or undertaking to pay, or capable of resulting in the payment of money or money's worth whether such payment be as respects amount fixed or unliquidated, as respects time present or future, certain, or dependent on any one contingency, or on two or more contingencies. . . ." The Bankruptcy Act of 1869 was repealed by the Bankruptcy Act of 1883, which in turn was repealed by the Bankruptcy Act, 1914, with certain immaterial exceptions. But the aforesaid definition of " liability " for the purpose of the Debtors Act, 1869, has been preserved, first by sections 149 (2) and 37 (8) of the 1883 Act, and now by sections 150 (2) and 30 of the 1914 Act, which was a consolidating measure.

It therefore follows that when section 13 (1) of the Debtors Act speaks of credit obtained in incurring any debt or liability, it covers the case where credit is obtained in incurring any liability to pay not only money but money's worth. Money's worth may consist of commodities or services, and accordingly if credit is obtained in incurring a liability to pay in money's worth, the case is within the express provisions of section 13, having regard to the statutory definition above set out. It is,

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therefore, erroneous to argue that credit can be obtained within the meaning of the section only if the debt or liability incurred is to pay money and money alone. The one answer suggested on behalf of the appellant is that the word " liability " in section 13 (1) refers to a debt payable in money in the future. Apart from any other defects it may have, this argument entirely ignores the expression " money's worth " in the statutory definition of the word.

In the present case the appellant received cash in advance. The liability he incurred was to render money's worth, that is, services in the near future to the customer who paid him the cash. In the meantime the customer trusted him to do the work. On these facts it is clear he received credit, and did so in incurring a liability within the meaning which the court has to give to that word. He obtained such credit by fraud, and thus the offence under section 13 is complete.

A number of authorities were referred to in the argument, but none of them was concerned with the same point, namely, whether credit can be obtained within the meaning of section 13 (1) when the correlative obligation is to pay in money's worth. It is not necessary, therefore, to discuss them, though it may be observed in passing that the case of JONES [1898] 1 Q.B. 119, where the accused obtained a meal in a restaurant with no means to pay for it, is, in many respects, the converse of the present case.

One final observation of a general character may be added. The present case was, on the evidence, a clear case of fraud. Mere delay in paying a debt or doing work, however, is not a criminal offence, and courts who try these cases will, no doubt, be on their guard against any attempt to abuse the section by bringing proceedings under it where there is no real evidence of fraud, but merely of procrastination. The court's power to award costs against a prosecutor may usefully be borne in mind in this connection.

Appeal dismissed.

[WESTERN CIRCUIT]

BEFORE

MR. JUSTICE DEVLIN

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Insanity—Defect of Reason—Disease of the Mind—Any Disease Capable of Affecting the Mind Within M'Naghten Rules—Question whether Disease had Mental or Physical Origin Immaterial—Question whether Defect of Reason Temporary or Permanent Immaterial—Trial of Lunatics Act, 1883 (46 & 47 *Vict. c.* 38), *s.* 2 (1).

Any disease capable of affecting the mind may be a "disease of the mind" causing an accused person to labour under a defect of reason within the meaning of the M'Naghten Rules relating to insanity, and it is immaterial whether the disease had a mental or physical origin, or whether the defect of reason caused by the disease is temporary or permanent.

The prisoner was charged with causing grievous bodily harm to his wife. The prisoner, who was a man of excellent character and had always been devoted to his wife, suffered from arteriosclerosis. It was common ground that all the requirements laid down in the M'Naghten Rules for the defence of insanity were satisfied, save that the question whether the prisoner was at the time of the act suffering from a disease of the mind was in issue. One doctor was of opinion that the physical disease of arteriosclerosis induced a condition of melancholia, which was a disease of the mind, as a result of which the prisoner did the act. Two other doctors were of opinion that the physical disease led to a congestion of blood in the prisoner's brain, which caused a temporary loss of consciousness as a result of which he acted irrationally and irresponsibly, but that, though arteriosclerosis could cause degeneration of the brain cells which would in time amount to disease of the mind, that stage had not yet been reached in the case of the prisoner.

Held that, whichever medical opinion the jury accepted, the jury would be bound to return the special verdict of Guilty but Insane under section 2 (1) of the Trial of Lunatics Act, 1883, since on either view the prisoner was labouring under a defect of reason caused by a disease, namely, arteriosclerosis,

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which was capable of affecting the mind, and was, therefore, a "disease of the mind" within the meaning of the Rules.

Trial at assizes before Devlin J.

The prisoner was indicted at Bristol Assizes on June 27, 1956, for causing grievous bodily harm to his wife. The undisputed evidence was that the prisoner, who suffered from arteriosclerosis, and who was a man of excellent character and had always been devoted to his wife, struck her violently with a hammer during the night. It was common ground that at the time of the attack the prisoner did not know the nature and quality of the act, and that all the requirements of the M'Naghten Rules for establishing a defence of insanity were present, save that the question whether the prisoner was suffering from a "disease of the mind" was in issue. A doctor called by the prosecution was of opinion that the arteriosclerosis had induced a condition of melancholia, a disease of the mind, as a result of which the prisoner committed the act. Two other doctors, one called by the prosecution and one by the defence, were of opinion that, whereas arteriosclerosis can cause degeneration of the brain cells which would in time amount to disease of the mind, that stage had not yet been reached in the case of the prisoner, and that at the time when he did the act he suffered from a congestion of blood in the brain, due to arteriosclerosis, which caused a temporary loss of consciousness, as a result of which he acted irrationally and irresponsibly.

Counsel for the defence submitted that the prisoner was not suffering from "a disease of the mind" within the meaning of the M'Naghten Rules and was, therefore, not insane according to the test laid down therein.

Michael Lee for the prosecution.

N. J. Skelhorn, Q.C. and *R. H. Bain* for the defence.

DEVLIN J.: It is apparent in the present case that when I come to charge the jury it will be necessary for me to direct them as a matter of law upon what I take to be the true meaning and effect of the Rules in M'NAGHTEN'S CASE (1843) 10 Cl. & Fin. 200, on which I have heard divergent arguments from counsel

for the prosecution and the defence. It is convenient, having heard the arguments, that I should state now what my ruling is going to be and give my reasons for it, so that when counsel come to address the jury they will know what is the law as I have declared it to be.

The facts of the case in relation to which this point has to be considered are that the accused, who is charged with causing grievous bodily harm to his wife, struck her during the night with a hammer with such violence as to inflict a grievous wound. He is an elderly man of excellent character and he and his wife have always been thought to be a devoted couple, and it seems that there is strong evidence to show that his act was entirely motiveless and irrational. I say strong evidence, but that is a matter which the jury will have in due course to decide; for the purpose of my ruling I assume the act was committed, as all the doctors think it was, while the accused was in a mental condition which made him not responsible for his actions. The three doctors are agreed that he did the act, as he says he did, not knowing anything about it and not having any real memory of it. It is not merely a question of his striking his wife when in some mental derangement, not appreciating that what he was doing was wrong, but in the view of all three doctors it is a case in which the accused was not conscious that he picked up the hammer or that he was striking his wife with it. In those circumstances if the presumption that a man is sane governs the case and if the jury accept the evidence to which I have referred, they would have to return a verdict of Not Guilty on the basis that the man was not responsible for his acts and did not know what he was doing and therefore could not have had the necessary guilty intent. That, indeed, was what happened in R. *v.* CHARLSON (1955) 39 Cr.App.R. 37, where the facts were somewhat similar. In that case the doctors were apparently agreed that the accused was not suffering from any disease of the mind which would render him insane at the time of the commission of the act. The present case is, in my judgment, entirely different, because here the doctors are not so agreed and the

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sole question that I have to determine, which was not considered in that case, is what is meant by " disease of the mind " within the meaning of the M'Naghten Rules.

Under the common law, this question could not have arisen. In the eyes of the common law, if a man is not responsible for his actions, he is entitled to be acquitted by the ordinary form of acquittal, and it matters not whether his lack of responsibility was due to insanity or to any other cause. That position in common law was altered by statute. The Trial of Lunatics Act, 1883, introduces what I think is best called a qualified form of acquittal as distinguished from the absolute acquittal. It is expressed in the verdict of Guilty but Insane, which has been held to be a verdict of acquittal and to mean in effect not guilty because he is insane. As a result of the qualified verdict the accused is detained in strict custody until Her Majesty's Pleasure be known and he is sent to some institution where his mental state can be assessed and considered; in the case of an absolute acquittal the prisoner, of course, is entitled to be discharged. The object of the Act, no doubt, was that people who committed crimes of violence, even though they were not responsible for their actions, ought not to be allowed to go free, because they might commit an act of violence again, but ought to be kept in custody until their position should be determined. It is, therefore, that Act which makes a dividing line, as it were, between those sorts of lack of responsibility which would give rise to a complete acquittal, such as, for example, complete drunkenness, and those sorts which fall within the terms of the Act permitting only the qualified form of acquittal to which I have referred. The distinction is an arbitrary one and the line between the verdicts is one which is drawn by statute. My duty is to give effect to the statute and to decide into which category the present case falls.

The Trial of Lunatics Act, 1883, s. 2 (1) provides " Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as

not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission." The material words are: " . . . it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done." Insanity is not a legal term and there is no such thing as a legal definition of insanity. This Act is concerned with responsibility more than with insanity, and I think it is useful to note that in the similar provision in relation to unfitness to plead insanity is given a very wide meaning indeed. Section 2 of the Criminal Lunatics Act, 1800, provides: " . . . if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment . . . it shall be lawful for the court before whom any such person shall be brought to be arraigned . . . as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody . . . " The Act follows the same pattern as the one which I have to consider. One Act deals with insanity where the accused person cannot be tried and the other with such insanity that he cannot be held responsible for his acts. In the case of the Act of 1800 it has been held that a deaf and dumb person is not fit to plead and has to be regarded as insane for the purposes of the Act.

The Act of 1883 is concerned with responsibility rather than with any definition of insanity; it predicates that it is given in evidence of the accused that he is insane " so as not to be responsible, according to law, for his actions." The test of responsibility, according to the law laid down in M'NAGHTEN'S CASE (1843) 10 Cl. & Fin. at p. 210, is in the following now

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familiar words: " . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." In the present case it is conceded that everything in that definition is satisfied except " disease of the mind." It is conceded for the purposes of this argument that the accused was labouring under a defect of reason, and that he did not know the nature and quality of the act he was doing. It is conceded also that there was something wrong with his mind, but it is submitted that there was no disease of the mind and that what he did was simply due to the condition of his mind, not amounting to a disease, and that therefore he is not within the rule in M'NAGHTEN'S CASE (*supra*). If that is so, then he is entitled to be tried on the assumption that he is sane, and if the responsibility for his act is not proved by the prosecution, he is entitled to a verdict of Not Guilty. It is common ground on the evidence that the accused was suffering from a physical disease, namely, arteriosclerosis, or hardening of the arteries. It had not reached the stage at which the accused was showing any general sign of mental trouble. Apart from a not irrational depression, produced by his poor state of health, there were no signs at all of mental trouble, and that would appear to be his physical state. How, therefore, did he get into a condition of unconsciousness or clouded responsibility when he committed the act? [After referring to the medical evidence, His Lordship continued:] According to the evidence there is no general medical opinion on what category of diseases are properly to be called diseases of the mind. The doctors have expressed their views, but they have expressed them as personal views and not views for which they can call in aid any general body of medical opinion.

The broad submission that was made on behalf of the defence was that this is a physical and not a mental disease, arteriosclerosis being primarily a physical and not a mental condition,

but that argument does not go so far as to suggest that for this purpose those diseases which affect the mind can be strictly divided into those that are physical in origin and those that are mental in origin. That there is such a distinction is clear from the evidence. I should think that it would probably be recognised by medical men that there are mental diseases which have an organic cause; that there are disturbances of the brain which can be traced to some hardening of the arteries, to some degeneration of the brain cells, or to some physical condition which accounts for mental derangement. It would probably be recognised that there are diseases functional in origin about which it is not possible to point to any physical cause, but simply to say that there has been a derangement of the functioning of the mind, such as melancholia, schizophrenia and many other of those diseases which are primarily handled by psychiatrists, but that distinction is rightly not pressed as part of the argument for the defence in the present case. The distinction between the two categories is irrelevant for the purposes of the law, which is not concerned with the origin of the disease or the cause of it, but simply with the mental condition which has brought about the act. It does not matter, for the purposes of the law, whether the defect of reason is due to a degeneration of the brain or to some other form of mental derangement. That may be a matter of importance medically, but it is of no importance to the law, which merely has to consider the state of mind in which the accused is, not how he got there.

The distinction which emerges from the evidence of the doctor called by the defence, and which has been argued by counsel for the defence, is different. It is that arteriosclerosis is something which is capable, as I understand it, of becoming a mental disease, but in the present case has not yet become one. It has not yet created any degeneration of the brain and the argument that it is merely interfering temporarily with the working of the brain by cutting off the supply of blood in the same way as concussion might. The test, therefore, which I am invited to apply is to say that this disease at this stage is

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purely physical, and that when it interferes with the brain cells so that they degenerate, it then becomes a disease of the mind. I should think that is a very difficult test to apply for the purposes of the law. I should think that it would be a matter of some difficulty medically to determine precisely at what point degeneration of the brain sets in and it would mean that the verdict depended on a doubtful medical borderline. The law is not in any way concerned with the brain, but with the mind, in the sense in which the term is ordinarily used in speaking of the mental faculties of reasoning, memory and understanding, particularly in the present case the faculties of reasoning and understanding. If one read for " disease of the mind " " disease of the brain," it would follow that in many cases pleas of insanity would not be established because it would not be established that the brain had been affected either by degeneration of the cells or in any other way. In my judgment, the condition of the brain is irrelevant and so is the question whether the disease is curable or incurable, or whether it is temporary or permanent. There is no warranty for introducing these considerations into the definition in the M'Naghten Rules. Either temporary or permanent insanity is sufficient to satisfy them.

I, therefore, accept the argument of counsel for the prosecution that stresses the order of the words in the Rule stated in M'NAGHTEN'S CASE (*supra*) which I have to apply, namely: " . . . party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing . . . " It is not labouring under a disease of the mind which produces the defect of reason, but the paramount thing that has to be looked for is the defect of reason. The prime thing is to determine in the present case whether or not there is a defect of reason, and, in my judgment, the words " from disease of the mind " are not to be construed as if they were put in for the purpose of distinguishing between diseases of the mind and diseases of the body, diseases which had mental or physical origin. They were put in primarily for the purpose of limiting the effect of the words

"defect of reason." A defect of reason is by itself enough to make the act irrational and therefore normally to exclude responsibility in law, but the Rule was not intended to apply to defects of reason which were caused simply by brutish stupidity without rational power. It was not intended that the defence should plead "Although he has a healthy mind, he nevertheless has been brought up in such a way that he never learned to exercise his reason, and therefore he is suffering from a defect of reason." The words ensure that it is only if the defect is due to a diseased mind and not simply to an untrained one that there is insanity within the meaning of the Rule in M'Naghten's Case (*supra*). The hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, and thus is a disease of the mind within the meaning of the Rule. I shall, therefore, direct the jury that it matters not whether they accept the medical evidence of the prosecution or of the defence, but that on the whole of the evidence they ought to find that there is a disease of the mind within the meaning of the Rule.

Verdict—Guilty but Insane.

Solicitors: Farnfield & Nicholls, Warminster, for the defendant.

CIRCUIT CASE

[MIDLAND CIRCUIT]

BEFORE

MR. JUSTICE FINNEMORE

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R. *v.* DARKHU

Plea—Fitness to Plead—Jury Unable to Agree—New Jury to be Sworn.

Where a jury, which has been impanelled and sworn to try the issue whether the prisoner is fit to plead, is unable to agree, they must be discharged and a new jury must be sworn to try the issue.

Trial on indictment.

The prisoner was indicted at Birmingham Assizes before Finnemore J. on July 12, 1956, for wounding with intent to murder. Before his plea was taken, a jury was impanelled and sworn to try the issue whether he was fit to plead. Evidence was given that he was suffering from paranoiac schizophrenia, but the jury were unable to reach agreement on this issue. The question then arose on the proper procedure to be followed.

J. E. S. Simon Q.C (*Michael Newell* with him) for the Crown submitted that the issue whether the prisoner was fit to plead and take his trial was an issue on which a final decision must be reached.

R. K. Brown, for the prisoner.

FINNEMORE J. accepted the submission of the counsel for the Crown. He discharged the jury and directed that a new jury be impanelled and sworn to try the issue whether the prisoner was fit to plead.

Solicitors—M. P. Pugh, Birmingham, agent for the Director of Public Prosecutions, for the Crown; Faber & Co., Birmingham, for the prisoner.

[IN THE COURT OF APPEAL]

BEFORE

LORD JUSTICE SINGLETON, LORD JUSTICE MORRIS AND LORD JUSTICE ROMER

Ex parte **BLACKBURN**

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Appeal to House of Lords—Refusal by Attorney-General of Application for Certificate—No Duty to Reconsider Application—Mandamus—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 16 (1).

On dismissal by the Court of Criminal Appeal of the applicant's appeal against conviction, the applicant, within seven days of the dismissal, applied to the Attorney-General under section 1 (6) of the Criminal Appeal Act, 1907, for a certificate authorising a further appeal to the House of Lords, and later gave reasons in support of his application. The Attorney-General considered the application and refused to grant a certificate. Some time after the lapse of the seven days the applicant renewed his application, supporting it by the same reasons as before, but referring also to certain decisions of the Court of Criminal Appeal given subsequently to his own case. The Attorney-General refused to reconsider the application and the applicant applied for an order of mandamus directing the Attorney-General to reconsider it.

Held, that no order of mandamus could issue as, if the application to the Attorney-General were to be regarded as the same as the applicant's original application, the Attorney-General was under no duty to reconsider an application which he had already considered; while, if it were to be regarded as a fresh application, it was outside the time limit imposed by section 16 (1) of the Criminal Justice Act, 1925, and on that ground the Attorney-General would be under no duty to consider it.

Appeal from order of a Divisional Court refusing an application for leave to apply for an order of mandamus.

The applicant was convicted at the Central Criminal Court of offences under the Prevention of Fraud (Investments) Act, 1939, and was sentenced to two years' imprisonment. He

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appealed to the Court of Criminal Appeal, which on March 29, 1955, dismissed his appeal (see (1955) 39 Cr.App.R. 84). Within seven days of the date of dismissal he applied to the Attorney-General under section 1 (6) of the Criminal Appeal Act, 1907, for the grant of a certificate authorising a further appeal to the House of Lords, but the Attorney-General refused to grant a certificate. Some time after the lapse of the seven days the applicant renewed his application to the Attorney-General, and on the Attorney-General refusing to reconsider the matter, the applicant applied *ex parte* to a Divisional Court for leave to apply for an order of mandamus directing the Attorney-General to reconsider the matter. On July 20, 1956, the Divisional Court—Pilcher and Ashworth JJ.—refused the application.

The applicant appeared in person.

SINGLETON L.J.: Section 1 (6) of the Criminal Appeal Act, 1907, provides: "If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from the court to any other court." It is to be observed that no time limit for the obtaining of a certificate is laid down by the subsection, but by section 16 (1) of the Criminal Justice Act, 1925, it is provided: "An application to the Attorney-General under section 1 (6) of the Criminal Appeal Act, 1907, for a certificate authorising an appeal to the House of Lords from the decision of the Court of Criminal Appeal, shall be made within a period of seven days from the date when the decision of the court was given." The applicant made his application for a certificate within the time; his reasons were given a little later.

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In his affidavit in support of his present application the applicant states in para. 4: "I made application for the certificate of the Attorney-General to enable me to appeal to the House of Lords within the time prescribed by the Criminal Justice Act, 1925 . . . The reasons were submitted three weeks later and rejected by the Attorney-General, whose legal secretary wrote me a letter to the effect that the application was refused." It is clear from the wording of section 1 (6) of the Criminal Appeal Act, 1907, that, before the Attorney-General grants a certificate, he must be of opinion "that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought." No one would doubt that when there is an application by a person who has been convicted and whose appeal against conviction has been dismissed by the Court of Criminal Appeal for a certificate from the Attorney-General under the subsection, it is the duty of the Attorney-General, entrusted to him by Parliament, to consider the application and to grant or refuse to grant a certificate. That was done by the Attorney-General. The affidavit sets out that the application was refused.

The applicant tells the court of further efforts to get the matter reconsidered, in part in correspondence with the Secretary of State and also by reference to a letter from the Attorney-General to a Member of Parliament, which is not exhibited, but part of which is set out in the affidavit of the applicant. It may be unusual that a letter of that kind should be used; but that is no concern of mine. According to the affidavit, the Attorney-General wrote to the Member of Parliament saying: "I am writing to you about [the applicant's] petition to the Home Secretary of May 28, in which he asks for permission (in the light of the MURTAGH CASE (1955) 39 Cr.App.R. 72) to apply for my certificate to enable him to appeal to the House of Lords. I am afraid that there was a certain amount of misunderstanding in regard to this application and I think it is only right that I should let you know that I am quite satisfied

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that it is not now open to me to consider this further application by [the applicant] which, as you will know, is not made within the statutory time limit of seven days laid down by section 16 (1) of the Criminal Justice Act, 1925. In taking this view I may say that I am acting fully in accordance with the precedents." That shows clearly that the Attorney-General had considered what I may speak of as the original application, and he regarded the further application as out of time. In para. 6 of the affidavit it is said that the applicant addressed a further petition to the Home Secretary " which was answered after three months by the direct statement, on the advice of the Attorney-General, that the Attorney-General was *functus officio* in the matter and would not entertain any representations with relation to my original application."

It is said by the applicant that in the case at the Central Criminal Court in which he was convicted the summing up by the learned judge was defective in some respects, though it was approved, or the conviction was held good, by the Court of Criminal Appeal in a judgment declared by Gorman J. It is said, further, that at some subsequent dates there were other cases in the Court of Criminal Appeal which show, or tend to show, that the decision of the Court of Criminal Appeal in the applicant's own case was wrong and bad in law. In this court we have not seen the summing-up of the learned judge in the applicant's case, though part of it is set out in the report of the case in the Court of Criminal Appeal (1955) 39 Cr.App.R. 84. Without expressing any opinion, I assume, for the purpose of this appeal, that his contention is right in regard to that matter. That does not dispose of the present application. In his submission to this court, the appellant said that there was a duty imposed upon the Attorney-General to consider representations by any of the parties named in section 1 (6) of the Criminal Appeal Act, 1907, and that he is charged with a judicial discretion whether or not he shall grant a certificate. He submitted further that the duty is not satisfied by considering an application once, but that there is a duty to reconsider it, although the applicant agreed that there was no

duty to consider a second application made after the time limit imposed by the Act of 1925 had lapsed. His argument was that he had applied within the time specified, and that, there having been an application in time, it was the duty of the Attorney-General to consider any renewal of the application; and, further, that if at any distance of time after the refusal to grant a certificate a like application, not another, but a like application, was made it was the duty of the Attorney-General to consider it again. That appears to me to involve this, that if there was an application in time, it could, year after year, be said that a like application could be made, and that every time it was made it was the duty of the Attorney-General to consider it. I do not think that that is the law. If it were, the whole object of section 16 (1) of the Criminal Justice Act, 1925, would be defeated. Section 16 (1) imposed a time limit of " seven days from the date when the decision of the [Court of Criminal Appeal] was given." If an application once made could be renewed time and time again, it would destroy the effect of the section.

The applicant agrees that there would be no duty on the Attorney-General to consider an application made out of time. His recent application is either the same application again, or it is a fresh application. If it is a fresh application, it is out of time; if it is the same, I see no reason for reading into section 1 (6) of the Act of 1907 an obligation upon the Attorney-General to reconsider it, which would be doing no more and no less than what he has already done. I assume for this purpose that there is, or would be in a proper case, a right to an order of mandamus against the Attorney-General if he refused to consider an application properly made under section 1 (6) of the Act of 1907. I assume it without deciding the matter. I am satisfied, on the other hand, that there is not cast on the Attorney-General the duty of considering the same matter again and again. The Home Secretary, according to an extract from the letter referred to in the affidavit of the applicant, says that the Attorney-General was *functus officio* in the matter. I am not sure that that is the right way of looking

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at it. If an application which was in time was refused and was followed by another within the time limit, setting out new reasons, I should consider that the Attorney-General would be entitled to look at the second application and to consider it on its merits. It has not been suggested to this court that there is any difference in the two applications made. The position may have changed in a sense. There have been one or two other decisions of the Court of Criminal Appeal, which, according to the argument addressed to us, state the law in a different way than that in which it was stated in the applicant's case, but the reasons given in his new application are the same as those in the original application except that he said that they were fortified by the subsequent decisions.

It seems to me that the real point of the present case is that the applicant is seeking to re-open his original application, and is asking the Attorney-General to consider either the old application or a new application in precisely the same terms, or based on the same reasons. I am wholly satisfied that it would not be right for this court to consider directing the Attorney-General to reconsider a matter which he has already considered; we have no right to do it. Even if there is a right to direct him to consider an original application, that is a position which would never arise, for the Attorney-General knows his duty under the subsection, and he would always consider an application made in due time. He is not bound to go on reconsidering the same application again and again. For these reasons—which are, in effect, the same as those given in the Divisional Court to which the applicant directed our attention—in my view this application or appeal, whichever it may be, should be dismissed.

In the circumstances I do not think it necessary to express any opinion on a further point which has been raised, namely, whether or not this is an application in a "criminal cause or matter," and should be refused by reason of the decision of the House of Lords in AMAND *v.* SECRETARY OF STATE FOR HOME AFFAIRS [1942] 2 All E.R. 381; *sub nom.* AMAND *v.* HOME

SECRETARY AND MINISTER OF DEFENCE OF ROYAL NETHERLANDS GOVERNMENT [1943] A.C. 147.

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MORRIS L.J.: I entirely agree.

ROMER L.J.: I also agree.

Appeal dismissed.

On November 15 a petition by the applicant for leave to appeal to the House of Lords was refused by the Appeal Committee of the House of Lords (Lord Simonds, Lord Tucker and Lord Somervell of Harrow).

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE ASHWORTH

THOMAS HENRY JAMES LOVELOCK

1956 *July* 24

Sentence—Conviction on One Count Quashed—Sentence Passed in Respect of Another Count Varied—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (1).

The appellant was convicted of attempted rape, in respect of which he was sentenced to six years' imprisonment. He had already pleaded Guilty to an alternative count of indecent assault arising out of the same incident, for which he received a concurrent sentence of two years' imprisonment. The requisite notices and previous convictions had been proved to render the appellant liable to a sentence of preventive detention. On the conviction of attempted rape being quashed,

Held, that the case was a proper one for the court to apply the provisions of section 5 (1) of the Criminal Appeal Act, 1907, and substitute for the sentence of two years' imprisonment passed in respect of indecent assault a sentence of six years' preventive detention.

Appeal against conviction.

The appellant was convicted at Leicestershire Assizes on May 24, 1956, of attempted rape of a girl under the age of 13, having already pleaded guilty to an alternative count of

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indecent assault arising out of the same incident. He was sentenced by Stable J. to six years' imprisonment and two years' imprisonment (concurrent).

The facts appear sufficiently from the judgment.

Brian D. Bush, for the appellant:

There was no evidence of any attempt at rape, and the judge never put to the jury the appellant's defence that nothing more than an indecent assault on the girl was ever contemplated.

James Ross for the Crown:

The conviction of attempted rape cannot be supported, but in view of the gravity of the indecent assault, the Court is asked to consider applying the provisions of section 5 (1) of the Criminal Appeal Act, 1907, which would entitle the court in this case to pass a sentence of preventive detention.

THE LORD CHIEF JUSTICE: The appellant was charged with attempted rape of a child under the age of 13. This is one of those cases which calls loudly for the intervention of the legislature with regard to increasing the sentences for this class of offence upon children. When the Attempted Rape Act was passed in 1948, the offence of carnal knowledge of a child under 13 was not even included. That was an Act which enabled a severer sentence than two years' imprisonment to be passed for attempted rape, and I imagine it was not observed that it also ought to have included attempted carnal knowledge.

In this case the appellant pleaded guilty to an indecent assault, but the learned judge insisted on having him tried for attempted rape. Then he directed the jury: "This man admits that he lay on the little girl and had an ejaculation, an emission of semen; what more could he have done than that, having regard to the size of the child, if he intended to rape her?" But that is not the point. The point is: Did he attempt to rape her? Everything here points to the fact that all he wanted to do was to have an emission, in other words, to masturbate himself by lying on this child, but there is no suggestion that he did attempt to penetrate the child. Evidence

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was given with regard to the emission and where it was, and so forth, on the child, but the learned judge forgot to put to the jury what the offence was. We cannot possibly say that there was any evidence here of an intended rape. There was as foul and filthy an indecent assault upon a child as has ever come before the court. That a man can be guilty of such an offence as this simply disgusts the court and disgusts everybody who heard the case, but we cannot uphold the conviction for attempted rape, and it must be quashed.

On the question of the sentence for indecent assault, Mr. Ross has very properly called the attention of the court to section 5 (1) of the Criminal Appeal Act, 1907. That is a subsection which, so far as my experience goes, has never been put into force before. In all the years I have sat in this court either as a puisne judge or as Chief Justice I have never known it applied, but it is a section which appears to me to apply in the clearest possible manner to this case. The subsection provides: "If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted."

I should think the reason why that subsection was included was this: Suppose there is an indictment containing three or four counts, and on the major count or the first count there is a conviction. The court passes a sentence of three years' or five years' imprisonment as the case may be. It then should proceed to pass some sentences which may be concurrent or consecutive, but are generally concurrent, upon the other counts; and the court may very easily think: "A sentence of five years' imprisonment has been passed on count 1, so it will be enough on counts 2 and 3 if we pass a sentence of three or five years' imprisonment concurrent on each count." Then the

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case comes before the Court of Criminal Appeal and the court says: "What has happened here obliges us to quash the conviction on count 1, but we affirm the conviction on count 2." It may be on the merits there is very little difference, if any, and perhaps no difference, between count 1 and count 2. The Court of Criminal Appeal, on quashing the conviction on count 1, will then have power to pass an adequate sentence for the conviction on count 2. That seems quite clearly to apply to this case. We have found that the appellant was not properly convicted on the first count which carried the sentence which Stable J. passed of six years' imprisonment, but he was properly convicted on the second count, which would normally carry only a maximum sentence of two years' imprisonment, but, as the necessary notices were served and convictions proved, it would in this case have been possible for the appellant to be sentenced to preventive detention, and that would be a sentence warranted in law. I have already said that a sentence of two years' imprisonment for a horrible offence of this sort was quite inadequate, and now what does one find? One finds that this is the fourth time he has been convicted of indecent assaults on little girls. He is therefore not safe to be at large with children, and the Court considers, therefore, it right to put into force the provisions of section 5 (1) of the Criminal Appeal Act, and we shall pass a sentence which could have been lawfully passed on the count of indecent assault, and that is a sentence of preventive detention. The length of preventive detention might have been very great, but, considering that it is the first time that this section has been invoked, we will impose only the same length of preventive detention as the learned judge did of imprisonment on the first count. The sentence upon the appellant is that he shall go to preventive detention for six years.

Conviction on one count quashed. Sentence varied on another count.

Solicitors—Mander & Prime, Rugby, for the appellant: J. M. Johns, Rugby, for the Crown.

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In *O'Grady* (1941) 28 Cr.App.R. 33 the appellant was convicted on two counts under the Treachery Act, 1940, for which she was sentenced to death, and on other counts in the same indictment of offences under the Official Secrets Acts, 1911, and the Defence (General) Regulations, 1939, in respect of none of which was any sentence passed. The Court of Criminal Appeal quashed the convictions under the Treachery Act, and in respect of the other offences of which the appellant had been convicted passed a sentence of 14 years' penal servitude.

In *Hervey & Goodwin* (1939) 27 Cr.App.R. 146 the appellants had been convicted on four counts of an indictment and a general sentence of two years' imprisonment had been passed. The Court of Criminal Appeal quashed the conviction of one of the appellants on two counts, and, although there had been no appeal against sentence, reduced the sentence to eighteen months' imprisonment. The Lord Chief Justice (Lord Hewart) observed at p. 149: "It appears to us . . . that it is within the power of the court to treat his notice of appeal as if it had included an appeal against sentence." No reference was made to s. 5 (1) of the Criminal Appeal Act, 1907.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ORMEROD AND MR. JUSTICE ASHWORTH

ALBERT JAMES LACEY

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Extension of Time for Appeal—Petition to Appropriate Authority Not presented within Prescribed Time—Courts-Martial (Appeals) Act, 1951 (14 & 15 *Geo.* 6, *c.* 46) *s.* 3.

An aircraftsman who had been convicted presented his petition to the Air Ministry two days out of time and the Air Ministry refused to accept the petition. On the matter being brought before the Courts-Martial Appeal Court,

Held, that the Air Ministry were right in the view which they took, as there was no permission either in the Courts-Martial

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(Appeals) Act, 1951, or the Rules made thereunder for extending the time; and it being by section 3 (2) of the Act a condition precedent to an application to the court for leave to appeal that the person convicted (except in the case of a conviction involving sentence of death), should have presented a petition to the appropriate authority within the time prescribed by the Rules, the court had no power to intervene.

The appellant, a senior aircraftsman, was convicted before a court-martial at Lichfield in February 1956, of obtaining money by false prentences, and was sentenced to be reduced to the ranks and to serve eighty-four days' detention. He presented a petition to the Air Ministry praying that his conviction be quashed two days out of time, and the Air Ministry refused to accept it. By direction of the Lord Chief Justice the matter was brought before the Courts-Martial Appeal Court.

No counsel appeared.

THE LORD CHIEF JUSTICE: The applicant, a senior aircraftsman, was convicted before a court-martial at Lichfield in February 1956, of obtaining money by false pretences, and was sentenced to be reduced to the ranks and to serve eighty-four days' detention. He sent a petition to the Air Ministry, who refused to accept it on the ground that it was out of time. The Air Ministry took the view that the petition was of no value as a petition under the Courts-Martial (Appeals) Act, but they accepted it as a petition for the exercise of the Royal Prerogative. I thought that the best course was to have the matter brought before the court in order that we could consider whether or not the Air Ministry were right in the view they took. There is no question that the petition was presented two days out of time, and it does not appear that there is any power to extend the time.

Section 3 of the Courts-Martial (Appeals) Act, 1951, provides: (1) " Subject to the following provisions of this Part of this Act, a person convicted by a court-martial may, with the leave of the court, appeal to the court against his conviction. (2) Except in the case of a conviction involving sentence

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of death, the right conferred by the foregoing subsection on a person convicted by a court-martial shall not be exercisable—(a) unless, within such period as may be prescribed, he presents to the appropriate authority a petition praying that his conviction be quashed. . . ." The time which is prescribed by the Rules is "in the case of a conviction by an Army or Air Force court-martial: (i) forty days next following that on which the finding of the court-martial was promulgated, if the court-martial was held in the United Kingdom; and (ii) sixty days next following that on which the finding of the court-martial was promulgated in any other case." There is no provision either in the Act or in the Rules for extending the time. There may be very good reason for that, because these matters ought not to be delayed. Whether or not it would be desirable to have such a Rule or to prescribe a period subject to the right of the court to extend it is a matter of policy which may be considered by the appropriate authority. We can only say here that the applicant cannot apply for leave to appeal because he did not comply with the condition precedent which the Act lays down, namely, that he must present his petition within the prescribed time.

The court comes to this decision without any real reluctance because it is quite obvious that there is no ground for interfering with this conviction. His only complaint against the conviction is that he says the offence had been condoned by an officer who had power to condone it. It is true that the Army Act does provide that an offence may be condoned, but it is equally clear that in this case there had been no condonation, and that the officer whom the applicant says would have condoned the offence would not have had any power, nor did he purport to do so.

For these reasons, if we could have extended the time, it is quite clear that we should not have given leave to appeal because there was no ground for it. Therefore we refuse this application, and, in our opinion, the Air Ministry were right in refusing to accept the petition.

Application refused.

BEFORE

MR. JUSTICE PILCHER, MR. JUSTICE ORMEROD AND MR. JUSTICE ASHWORTH

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BERTRAM FRASER BURGESS

Evidence—Corroboration—Indecent Assault on Adult Male.

It is just as desirable that a jury should be warned of the danger of convicting on the evidence of the complainant in the absence of corroboration in the case of indecent assault on an adult male as in any other case of indecent assault or sexual offence.

Appeal against conviction.

The appellant was convicted at Middlesex Quarter Sessions on May 14, 1956, of indecent assault on an adult male, and was sentenced by the Deputy-Chairman (The Hon. E. E. S. Montagu, Q.C.) to a fine of £10 and ordered to pay £50 costs.

The offence was alleged to have been committed by the appellant during a cinema performance on a police officer off duty who was sitting next to him. There was no corroboration of the evidence of the police officer and the jury did not receive any warning on the absence of corroboration.

James Burge, for the appellant.

There was no corroboration of the evidence of the police officer and the jury should have been warned of the danger of acting on his evidence in the absence of corroboration. It is a well-established practice that such a warning should be given in all cases of indecent assault, irrespective of the age of the complainant. There is no express authority which lays down that such a warning must be given where the complainant in respect of the indecent assault is an adult male, but it is clear from all the authorities which have dealt with the desirability of corroboration in cases of indecent assault that the warning is rendered necessary not only by the age of the complainant,

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but also by the nature of the offence. In the present case the jury were absent for a long time considering their verdict and it may well be that, if a warning had been given, they would have acquitted.

W. G. Fordham, for the Crown.

It is conceded that no warning on the desirability of looking for corroboration was given in the present case owing to an oversight on the part of the Deputy-Chairman and it is further conceded that it has been the practice to give such a warning in this class of case. Such a warning is, no doubt, desirable in the case of indecent assaults on women, and on young persons, whether boys or girls, and all the reported cases have been concerned with indecent assaults of that kind. There is no reported case which extends the principle to an indecent assault on an adult male, where different considerations apply.

ORMEROD J.: This is an appeal by Bertram Fraser Burgess, who was convicted at Middlesex Sessions of indecent assault on a male person and was fined £10 and ordered to pay £50 costs.

The point at issue in this appeal is a very short one. It is quite unnecessary for me to go into the facts at length. Quite shortly, the charge that was made against the appellant was that on the evening of March 21, 1956, he went into a cinema and found himself sitting next to a man who turned out to be a police officer off duty, and who alleged that in the course of the performance the appellant indecently assaulted him. The police officer then took him to the manager's office and some conversation took place there, and the appellant was arrested and charged with this offence, and eventually convicted.

The only real evidence in the case was the evidence of the police officer on the one hand and that of the appellant on the other. There is some suggestion that the conversations which took place both in the manager's office and between the appellant and the police officer when he was charged might have amounted to an admission, but I do not think that was

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pressed at the trial, and certainly on the information before this court do not appear to amount to an admission or to be corroboration of the allegation made by the police officer.

The learned Deputy-Chairman, in summing up, omitted to warn the jury of the desirability of corroboration in a case of this kind, a case of indecent assault upon another male person, but an adult of full age, and the appellant appeals against his conviction because no warning was given to the jury of such desirability.

It is clear from the summing-up, which appears to have been satisfactory in other ways, that in fact no warning was given to the jury of the desirability of corroboration, and the only point to be considered here is whether in a case of this kind there should be such a warning. There is no doubt, indeed it is admitted by Mr. Fordham on behalf of the prosecution in this case, that it is the practice of judges in cases of this kind in summing up to a jury to tell them that it is desirable that the evidence of the complainant should be corroborated. But it is urged by Mr. Fordham that, although corroboration may be desirable in the case of indecent assaults on women and young persons, including boys, there is no authority pointing out the desirability of this course in the case of an indecent assault on an adult male person. There may be no direct authority, but there is no doubt what is the practice. It is clear from the judgments in the various cases dealing with corroboration in sexual offences that it is just as necessary that the jury should be warned of the desirability of corroboration in a case of this kind as in any other case of indecent assault or other sexual offence.

In this particular case the jury, having retired, were absent for some two hours and twenty minutes, some part of which time may have been due to the luncheon adjournment, but they were certainly absent a considerable time before they came to their decision, which may well mean that they were in some doubt about the matter and had some difficulty in making up their minds. In those circumstances, had the jury been

warned of the desirability of corroboration, the appellant might well have been acquitted. The court is of opinion that this is a conviction which cannot in the circumstances be upheld, and the appeal must be allowed and the conviction quashed.

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Conviction quashed.

Solicitors—Beach & Beach, for the appellant.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

MR. JUSTICE PILCHER, MR. JUSTICE ORMEROD AND MR. JUSTICE ASHWORTH

ARTHUR JOHN JENNINGS

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Road Traffic—Careless Driving—Offence Committed in Germany—No Notice of Intended Prosecution—Liability of Soldier to Conviction by Court-Martial—Army Act, s. 41 (5)*—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 12, 21.

On December 10, 1955, the appellant drove a motor vehicle in Germany in such circumstances that the offence of careless driving, contrary to section 12 of the Road Traffic Act, 1930, would have been committed if the driving had been in England. He was interviewed by the military police immediately after the occurrence, but he was not informed that it was intended to proceed against him by court-martial until February, 1956. He was charged under section 41 (5) of the Army Act with the civil offence, and at his trial entered a plea in bar on the ground that he had not been sent within fourteen days of the alleged offence a notice of intended prosecution as required by section 21 of the Road Traffic Act, 1930. The plea was held not to be good and he was convicted.

Held, that section 21 of the Act of 1930 being a procedural section only, the court-martial was entitled to convict, as circumstances which would constitute the offence in England had been proved, although the procedure prescribed by section 21 had not been followed.

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Appeal against conviction.

The appellant, Warrant Officer Arthur John Jennings, was convicted by a district court-martial in Germany on a charge under section 41 (5) of the Army Act of having committed the civil offence of careless driving, contrary to section 12 of the Road Traffic Act, 1930. He was fined £15, subsequently reduced by the Confirming Authority to £10. The offence was committed on December 10, 1955. Immediately afterwards the appellant was interviewed by the military police, but he was not informed that it was intended to proceed against him by court-martial until February, 1956. At the hearing he entered a plea that the charge would not lie because the provisions of section 21 of the Road Traffic Act, 1930, with regard to the sending of a notice of intended prosecution had not been fulfilled, but the court held that the plea failed.

Melford Stevenson Q.C. and *Dennis Lloyd* for the appellant.

The Solicitor-General (*Sir Harry Hylton-Foster* Q.C.) and *E. Garth Moore* for the Crown.

PILCHER J.: This is an appeal against a conviction by a District Court-Martial in Germany of the civil offence of driving without due care and attention. That is an offence made punishable by section 12 of the Road Traffic Act, 1930. No particular punishment is assigned to the offence in that section.

The appellant appeals against this conviction, which was implemented by a fine of £15, subsequently reduced by the Confirming Authority to £10, on the ground that the provisions of section 21 of the Road Traffic Act, 1930, were not fulfilled by the military authorities. Section 21, the caption to which is "Restrictions on prosecutions under the preceding sections," is in the following terms: "Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(a) he was warned at the time the offence was committed that the

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question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying" a number of matters was sent to him by registered post.

The offence in this case was committed on December 10, 1955, and immediately after it the appellant was interviewed by the military police, but he was not informed that it was intended to take proceedings against him by court-martial until some date in February, 1956, and the proceedings took place on March 10, 1956. The proceedings in respect of this civil offence, which is an offence punishable by ordinary law, took place under section 41 of the Army Act, which is in the following terms: "Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence) shall be liable to be tried by court-martial, and on conviction to be punished as follows; that is to say . . . (5) if he is convicted of any offence not before in this section particularly specified, which when committed in England is punishable by the law of England, be liable, whether the offence is committed in England or elsewhere, either to suffer such punishment as might be awarded to him in pursuance of this Act in respect of an act to the prejudice of good order and military discipline, or to suffer any punishment assigned for such offence by the law of England. . . ."

The appellant took the point at the court-martial by a plea in bar that he could not be convicted or punished in respect of this civil offence. It is not now in question that a civil offence of careless driving existed and he had not received a warning that he would be prosecuted, and no summons had been issued,

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because no summons could be issued in Germany, nor had he been sent within fourteen days a notice of intended prosecution or proceedings by court-martial. That contention was rejected at the court-martial.

Mr. Stevenson in his admirable and succinct address puts the matter quite shortly. He says: Here were proceedings brought under section 41 of the Army Act. This was an offence which, if committed in England, would be punishable by the law of England, but in the particular circumstances, having regard to section 21 of the Road Traffic Act, whilst in England it would be perfectly competent to initiate proceedings against the appellant, it would necessarily be impossible to convict him for admitted careless driving, because it is common ground that he was neither warned nor given notice nor summoned in accordance with the provisions of the section. Therefore, when one finds that section 41 of the Army Act is invoked in order to bring the offence within the provisions of the Road Traffic Act, one must also take account of section 21 of the latter Act. I think he puts it in this way. Under section 41 of the Army Act there can be a conviction only in respect of offences which are punishable by the law of England. This offence was not punishable by the law of England because there was a failure to give the appellant the appropriate warning or notice provided for by section 21, and consequently it was not competent to the court-martial to convict him under section 41 of the Army Act. The Solicitor-General, on the other hand, whose address was equally clear and equally succinct, argued that section 21 is, in effect, only a procedural section. There is no question here that the appellant was guilty of the offence of careless driving and under section 113 of the Road Traffic Act would, under the civil law, have been liable, amongst other things, to be fined in respect of a first offence a sum not exceeding £20. But, he says, section 41 of the Army Act must be looked at with some care. All it does is to make a person guilty of a civil offence guilty of a military offence, and section 21 of the Road Traffic Act is merely a procedural section which applies in England only, the provision that a defendant must

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be summoned, which is one of the three alternative requisites provided, being quite inapplicable to a soldier serving abroad. He further contends that, though it is no offence under the Road Traffic Act to drive carelessly in Germany, none the less the authorities are entitled by section 41 of the Army Act to invoke the provisions of the Road Traffic Act, and relies especially on section 41 (5), which specifically provides that if a soldier is convicted of any offence, not being an offence already mentioned, which when committed in England is punishable by the law of England, he shall be liable to be punished under military law. He submits, I think with some force, that, the offence here being that of careless driving, it is an offence punishable by the law of England. He submits, again with some force, that it is idle to say that a man who has clearly committed the offence of careless driving under the Road Traffic Act has not committed the offence until one or other of the provisions of section 21 has been complied with by the prosecution. He has committed the offence and is liable to be punished for it unless he can satisfy the court that none of the provisions of section 21 has been fulfilled, the section being purely procedural.

In the opinion of the court the submission of the Solicitor-General is correct. Section 21 is a procedural section, and consequently, in spite of the fact that the procedure provided for by that section was not carried out in this case, the court-martial were entitled, as they did, to convict the appellant in respect of an offence of which he was guilty. The appeal, therefore, will be dismissed.

Appeal dismissed.

Solicitors: Lomer & Wheater, for the appellant.

BEFORE

MR. JUSTICE HALLETT, MR. JUSTICE ORMEROD AND MR. JUSTICE DONOVAN

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JAMES CLINTON JORDAN

Fresh Evidence—Murder—Medical Evidence as to Cause of Death not Available at Trial—Conviction Quashed—Death Resulting from Abnormal Treatment of Felonious Injury.

Conviction of murder quashed after the court had heard fresh medical evidence, which was not in any true sense available at the trial, as to the cause of death, the court emphasising the fact that such reception of fresh evidence was to be regarded as wholly exceptional

HARDING (1936) 25 Cr.App.R. 190 referred to.

The court intimated that it would not be assisted by an investigation, through cross-examination or through calling other doctors, into the correctness of the two opinions expressed by the two fresh witnesses since its function was not to decide whether those opinions were correct, but whether, being tenable opinions (as the prosecution admitted), they would have been likely to have affected in favour of the appellant the verdict of the jury.

Semble, that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but that the same principle does not apply where the treatment employed is abnormal.

Appeal against conviction.

The appellant was convicted at Leeds Assizes on July 20, 1956, of murder and was sentenced by Byrne J. to death.

The appellant, a coloured American airman, stabbed a man named Walter Beaumont, aged 27, in a café in Hull, on May 4, 1956. Beaumont died in hospital on May 12. At the trial evidence was given on behalf of the prosecution by the pathologist who carried out the post-mortem examination that the cause of death was broncho-pneumonia following penetrating abdominal injury.

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Geoffrey Veale, Q.C. (*R. R. Rawden-Smith* with him) for the appellant. No complaint is made of the summing-up and there would not have been any appeal were it not for the fact that the doctor who treated the deceased man in hospital got in touch with the United States Air Force authorities, because he took a different view as to the cause of death from that which was expressed at the trial. Leave is sought to call further evidence relating to the cause of death.

P. Stanley-Price, Q.C. (*J. S. Snowden* with him) for the Crown. In the circumstances the application for leave to call further evidence is not opposed by the Crown.

The court granted the application, and evidence was given by Dr. Keith Simpson and Mr. Guy Blackburn, who stated that in their opinion death had not been caused by the stab wound, but by the introduction of terramycin after the deceased man had shown that he was intolerant to it and by the intravenous introduction of abnormal quantities of liquid. These witnesses were cross-examined by counsel for the prosecution, who intimated that he had other medical witnesses available.

HALLETT J.: This is an exceedingly unusual case, and it might from one point of view be described as a difficult case, but we think that it can be dealt with with comparative brevity. We have considered the points that arise and have no doubt about any of them and it is the desire of the court that I should deliver judgment at once.

The facts of the case, so far as I need refer to them, are as follows. The appellant, together with three other men, all serving airmen of the United States Forces, were charged with the murder of a man named Beaumont as the result of a disturbance which arose in a café at Hull. Beaumont was stabbed with a knife. There was no evidence that any one of the other three men used a knife on Beaumont or was acting in concert with the man who did use the knife, and accordingly Byrne J., who tried the case, directed the acquittal of those three men. With regard to the appellant it was ultimately conceded by Mr. Veale, who appeared for him in the court below and in this

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court, that he did use the knife and stab Beaumont. Beaumont was admitted to hospital very promptly and the wound was stitched up, but none the less he died not many days after. In those circumstances the appellant was tried for murder. Various defences were raised, accident, self-defence, provocation and stabbing in the course of a quarrel. On all of those defences the direction of the learned judge is not in any way challenged and the jury rejected them.

Mr. Veale told us, with his usual frankness, that the original intention of the defence was not to lodge an appeal, but certain information reached the United States authorities and the defence became in a position to put forward further evidence, and in particular the evidence of two doctors, Dr. Keith Simpson and Mr. Blackburn, whose standing is beyond question.

Application was made to the court for leave to call this additional evidence. It is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the court is ever willing to listen to additional evidence. There are most obvious reasons, which I need not restate, because they have been stated with authority on more than one occasion before, why such applications should be granted only with great restraint. There are three cases to which I will refer, and I will refer to them in inverse order of date. The latest is SPARKES (*ante*, p. 83), where there had been a reference to the court by the Home Secretary under section 19 of the Criminal Appeal Act, 1907, and that case decided that the considerations which apply to such references are different from those which apply to an ordinary appeal.

The second case is M'GRATH [1949] 2 All E.R. 495, where it is pointed out that, when an appeal comes before the court in an ordinary case, the considerations are different from those which apply in cases referred to by the Home Secretary. The headnote correctly states what is said in the judgment with regard to the case which comes before the court in the ordinary way: "The court would not usurp the function of the jury when the trial had been properly conducted, nor would it hear

further evidence unless it were shown that the proposed witness had not been available to give evidence at the trial."

The other requisite to the granting of such an application is, that the additional evidence must be such that, in the opinion of the court, it probably would have affected the verdict which the jury returned, and in connection with the second requisite it is not irrelevant here to mention that the jury were absent for two hours, that they returned for a further direction and were absent again, and that they finally, after some three hours of consideration, found the appellant guilty, with a strong recommendation to mercy. Perhaps that is relevant in considering the effect that any further evidence would in all probability have had on the jury's mind.

[After referring to the summing-up and the medical evidence at the trial, his Lordship continued.] The further evidence is said to show that death was not, to use the words of Byrne J., " consequent upon the wound inflicted." On the contrary, both the doctors called are of opinion that, from the medical point of view, it cannot be described as caused by the wound at all. Whether from the legal point of view it could be described as caused by the wound is a more doubtful question. There are a number of cases in which the judges have discussed in what circumstances a death can be regarded as the result of a wound where something other than the inflicting of the wound has been the immediate cause of death. The circumstances vary very much. The judges in each case have ruled in the light of the circumstances with which they had to deal, and out of four cases the jury acquitted in two and convicted in two. First, as to the requirements allowing fresh evidence to be called; in the present case it seems clear to us that the fresh evidence was not in any true sense available at the trial. It did not occur to the prosecution, the defence, the judge, or the jury that there could be any doubt but that the stab caused death. The trial proceeded upon that basis. In those circumstances we thought it right to take the view that this was a case where the evidence sought to be given had not been in any true sense available at the trial. The case

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is markedly distinct from a case such as SPARKES (*supra*), where Donovan J. pointed out that the evidence was available to the appellant if he thought fit to use it.

I have not yet referred to what is perhaps the most important case from the present point of view, HARDING (1936) 25 Cr.App.R. 190. The headnote is short: "Conviction of murder quashed after the court had heard fresh medical evidence as to the cause of death, the court emphasising the fact that such reception of fresh evidence was to be regarded as wholly exceptional." I hope I have made it plain that this court has well in mind that such reception must be wholly exceptional.

As to the second requisite, namely, that the evidence proposed to be tendered is such that, if the jury had heard that evidence, they might very likely, and indeed probably would, have come to a different verdict, we feel that, if the jury had heard two doctors of the standing of Dr. Keith Simpson and Mr. Blackburn give evidence that in their judgment death was not due to the stab wound but to something else, the jury might certainly have hesitated very long before saying that they were satisfied that death was due to the stab wound. The jury, of course, would not be bound by medical opinion, but flying in the face of it, particularly in a capital case, is a thing any jury would hesitate to do. When Mr. Stanley-Price was trying to assist the court by cross-examining those doctors with a view to showing that they were mistaken in their opinions, and when he told us that he was prepared to tender the evidence of doctors who would, according to his instructions, probably express other opinions, we felt bound to say that the question is not whether we, if we were a jury, would have accepted and acted on the opinions those gentlemen expressed, but whether the jury in all probability would have allowed their verdict to be affected by them.

There is one further aspect that it is important I should emphasise lest this case is cited in some other case. There were two things other than the wound which were stated by these two medical witnesses to have brought about death. The stab wound had penetrated the intestine in two places,

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but it was mainly healed at the time of death. With a view to preventing infection it was thought right to administer an antibiotic, terramycin.

It was agreed by the two additional witnesses that that was the proper course to take, and a proper dose was administered. Some people, however, are intolerant to terramycin, and Beaumont was one of those people. After the initial doses he developed diarrhoea, which was only properly attributable, in the opinion of those doctors, to the fact that the patient was intolerant to terramycin. Thereupon the administration of terramycin was stopped, but unfortunately the very next day the resumption of such administration was ordered by another doctor and it was recommenced the following day. The two doctors both take the same view about it. Dr. Simpson said that to introduce a poisonous substance after the intolerance of the patient was shown was palpably wrong. Mr. Blackburn agreed.

Other steps were taken which were also regarded by the doctors as wrong—namely, the intravenous introduction of wholly abnormal quantities of liquid far exceeding the output. As a result the lungs became waterlogged and pulmonary oedema was discovered. Mr. Blackburn said that he was not surprised to see that condition after the introduction of so much liquid, and that pulmonary oedema leads to bronchopneumonia as an inevitable sequel, and it was from bronchopneumonia that Beaumont died.

We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but we do not think it necessary to examine the cases in detail or to formulate for the assistance of those who have to deal with such matters in the future the correct test which ought to be laid down with regard to what is necessary to be proved in order to establish causal connection between the death and the felonious injury. It is sufficient to point out here that this was not normal treatment. Not only one feature, but two separate and independent features, of treatment were,

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in the opinion of the doctors, palpably wrong and these produced the symptoms discovered at the post-mortem examination which were the direct and immediate cause of death, namely, the pneumonia resulting from the condition of oedema which was found.

The question then is whether it can be said that, if that evidence had been before the jury, it ought not to have, and in all probability would not have, affected their decision. We recognise that the learned judge, if this matter had been before him, would have had to direct the jury correctly on how far such supervening matters could be regarded as interrupting the chain of causation; but we feel that in the end it would have been a question of fact for the jury depending on what evidence they accepted as correct and the view they took on that evidence. We feel no uncertainty at all that, whatever direction had been given to the jury and however correct it had been, the jury would have felt precluded from saying that they were satisfied that death was caused by the stab wound.

For these reasons we come to the conclusion that the appeal must be allowed and the conviction set aside.

Conviction quashed.

Solicitors—Payne & Payne, Hull, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ASHWORTH

1956
Oct. 3

ERNEST HENRY STREAMS

Committal for Trial—Power to Commit to "Foreign" Court—Nearest Convenient Court to be Sought—Circuit Limitations to be Disregarded—Magistrates' Courts Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *s.* 10 (1).

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Oct. 3

ERNEST HENRY STREAMS

Goddard L.C.J., Hilbery J., Ashworth J.

Observations on the undesirability of justices committing a prisoner for trial under section 10 (1) of the Magistrates' Courts Act, 1952, to a geographically distant court, even if on the same circuit as the court to which the prisoner would in ordinary circumstances be committed, and on the desirability of seeking the nearest convenient court that is possible, even if not on the same circuit.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at Salop Assizes on June 21, 1956, of robbery with violence and was sentenced by Ashworth J. to three and a half years' imprisonment.

No counsel appeared.

THE LORD CHIEF JUSTICE: There is no ground whatever for giving leave to appeal against either conviction or sentence, but I want to make an observation of general application about the case for the guidance of committing justices.

The offence was committed in Berkshire, in the borough of Reading, just after the assizes. No doubt the justices thought that it would be a proper thing—and I am not criticising this at all—that they should use the powers which have been given them by section 10 (1) of the Magistrates' Courts Act, 1952, of committing the prisoner for trial to what is called a "foreign" court, that is, instead of committing him to the next Berkshire Assizes, to commit him elsewhere, to prevent him from being detained in prison for a long time without trial. I hope, however, justices will bear in mind when they are exercising that power that they should send the case to the nearest convenient court that is possible, because, if they send it to a far distant court, the expense which is put on public funds is very greatly increased. This case was committed by the Reading justices to Hereford, no doubt because Hereford is on the Oxford circuit, and, in the ordinary course, the case would have been committed to Berkshire Assizes, which are also on the Oxford circuit. The learned judge on the circuit was only three days at Hereford and he could not try the case

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there, so he sent it to Shrewsbury. Whether it went to Hereford or Shrewsbury is neither here nor there; they are both a long distance from Reading and the increased expense of the prosecution must have been very great. The obvious place to which this case should have been sent was the Central Criminal Court, because London is very much nearer Reading than Shrewsbury or Hereford. I am far from suggesting that, in all such cases, justices in the Home Counties should be very ready to commit to the Central Criminal Court, because the Central Criminal Court has plenty of work as it is, but there are occasions when, in order to prevent a man from being detained a long time in prison without trial, cases do go to the Central Criminal Court and the judges there are willing to try them.

I hope that justices all over the country will remember that, if they are exercising their powers of committing a case to a "foreign" court, they should commit to the nearest court that can conveniently be found. It is unnecessary to commit to a place on the same circuit; it may very often happen that the case will go to another circuit, but the question of keeping down the costs of prosecutions should be borne in mind.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE ASHWORTH

1956
Nov. 5

FRANCIS FRASER

ROBERT WARREN

Evidence—Hostile Witness—Evidence in Contradiction of Previous Statement Held by Prosecution—Duty of Prosecuting Counsel.

Where a Crown witness gives evidence on oath in direct contradiction of a previous statement made by him which is

in the possession of the prosecution, it is the duty of counsel for the prosecution at once to show the statement to the judge and ask the judge's leave to cross-examine the witness as hostile.

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Goddard L.C.J., Hallett J., Ashworth J.

Applications for leave to appeal against conviction.

The applicants were convicted at the Central Criminal Court on June 15, 1956, of wounding with intent to do grievous bodily harm and were each sentenced by Donovan J. to seven years' imprisonment.

The injured man, Comer, who had been the victim of a gang fight, stated on oath that he was unable to identify his attackers and that he was certain that the applicants were not the men. The prosecution had in their possession a statement made by Comer two days after the attack, in which he enumerated to the police the names of seven or eight persons as his attackers, specifying in particular the two applicants and describing the weapons which they had. Counsel for the prosecution did not ask for leave to cross-examine Comer as a hostile witness, but, during the course of the trial, through the cross-examination of a police officer, Donovan J. became aware of the existence of this statement. He then sent for it and cross-examined Comer on it.

B. Gillis, Q.C. and *P. A. Marrinan*, for the applicants.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The court has fully considered the matter, and the applications for leave to appeal are refused, but, before parting with the case, the court desires to say one thing of general importance, of which I hope some notice will be taken.

In this case, as in a recent case of very much the same character and where the same point arose, counsel for the prosecution must have had in his possession a statement by the injured man, who, when he went into the witness-box, gave evidence which was entirely contrary to what he had said in

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that statement. The case that was put forward by the prosecution was one of what is known as a "gang fight." We know quite well that very often in such cases the injured man departs from the statement which he has first made in which he has positively identified the persons who attacked him and afterwards says that he cannot identify them. It may be that there is a kind of honour among razor slashers and that they prefer to settle their own differences. What courts have to decide is whether men prosecuted in such circumstances are guilty of the offences with which they are charged, irrespective of whether the injured man is a scoundrel, because the law will not permit razor fights in the streets of London or any other city.

In this case counsel must have had among his papers—or, if he did not, whoever was responsible for the prosecution should have provided him with it—a statement in which the injured man Comer, two days after the attack on him and when he was in hospital, had enumerated to the police the persons who had attacked him, naming among others the two applicants and saying that one of them, whom he named, had a knife in his hand and cut him with it and that the other had an iron bar in his hand. Among the persons he named, seven or eight in all, he named those two particularly and specified the weapons they had. Then, when he went into the witness-box at the Central Criminal Court, he denied all knowledge of his attackers and even went so far as to say that he was certain that the applicants were not the men. If counsel had in his possession that statement to which I have referred, it was his duty at once to show the statement to the judge and ask the judge's leave to cross-examine the witness whom he had called as hostile to the prosecution, as of course he was when, after identifying the persons who attacked him and describing what they did, he went into the witness-box and told what appeared to be a pack of lies with regard to identification. It was left to the learned judge to bring that out himself, and the matter came out just as one of those things

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that fortunately happen in the interests of justice. Counsel for the defence was cross-examining a police officer and asked him whether Mrs. Comer, the wife of the injured man, had not named certain other persons as having taken part in the attack on Comer, and the police officer answered: "No, it was Mr. Comer who indicated such persons." That at once indicated to the judge that Comer had made a statement naming his attackers. He sent for the statement, and there found that Comer had done so. The learned judge then proceeded to put questions to the witness which, in the opinion of the court, ought to have been put by counsel for the prosecution after obtaining the judge's leave to cross-examine. If the prosecution have information in their possession which shows that the evidence which a witness called for the prosecution has given is in flat contradiction of a previous statement which he has made and so entitles the prosecution to cross-examine, they should apply for leave to cross-examine and not leave it to the judge to do so, because it is counsel's duty to cross-examine in such circumstances. If he has not done so, the judge has to do it. That is not right, because it may look as if the judge is taking sides, but he cannot help intervening in such circumstances, because it is his duty to see that the justice is done. The learned judge in this case was abundantly justified in sending for the statement and in asking the questions which he asked. I hope that in future in such cases counsel for the prosecution will not hesitate to ask for leave to cross-examine.

Applications refused.

Solicitors: Probyn, Dighton & Parkhouse, for the applicants.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE McNAIR

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Nov. 12

PRACTICE NOTE

INDICTMENT—SETTLING—NOTIFICATION OF ALTERATIONS AND ADDITIONS—INSPECTION BY PROSECUTION AND DEFENCE.

The following statement was made by

THE LORD CHIEF JUSTICE: The Attorney-General has informed the court that some diversity of practice exists with regard to the settling of indictments and affording inspection of them before trial. It is desirable that the practice both at Assizes and Sessions should be uniform and also that an accused person should, when practicable, be informed before trial of any charges included in the indictment additional to or varying from those on which he has been committed. Accordingly, the court in collaboration with the Attorney-General has prepared a Practice Note which I am about to read and which we hope will be published in the Reports and legal journals and should be followed by those whose duty it is to prepare indictments.

(1) The prosecution are entitled to require that the terms of an indictment should be settled by counsel. Clerks of Assize and of the Peace can require it to be settled by counsel when they think fit. The necessity and cost of employing counsel will be a matter for the taxing officer. (2) Where an indictment or draft indictment settled but not signed contains counts which differ materially from or are additional to the charges on which the accused was committed for trial, the Clerk of Assize or Clerk of the Peace shall, except where the indictment has been settled by counsel for the prosecution, notify the prosecution and the accused of the fact and, where the indictment has been settled by counsel for the prosecution,

notify the accused of the fact as soon as may be. (3) On or after Commission Day at Assizes or the day before the Sessions open at the Central Criminal Court or at Quarter Sessions or earlier at the discretion of the Clerk of Assize or Clerk of the Peace, facilities shall be given to the prosecution and to the accused to inspect the indictment or the draft indictment if the indictment has not then been signed. If on those days the indictment is not drafted, such facilities shall be given as soon as possible.

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PRACTICE NOTE

Goddard L.C.J., Hallett J., McNair J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE McNAIR

GLYN RHYS EVANS

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Sentence—Persistent Offenders—Notice of Previous Convictions and Sentences—One Conviction and Sentence of Preventive Detention Only Set Out—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1), (2), *s.* 23 (1), (2).

In order to be a valid notice under section 23 of the Criminal Justice Act, 1948, the notice must set out all the previous convictions and sentences on which it is intended to rely as qualifying the offender for preventive detention, corrective training, or a supervision order, as the case may be.

Where, therefore, a notice stated that it was intended to prove: "Convictions and sentences as follows:—Glamorgan Assizes in 1951, larceny—four cases of stealing pedal cycles. Larceny of tools. Seven years' preventive detention," and the appellant, on admitting that conviction and sentence, was sentenced to preventive detention,

Held, that the notice was defective, in that it did not set out three previous convictions two of which had been followed by a sentence of Borstal training, imprisonment or corrective training, and that, therefore, the sentence of preventive detention could not stand.

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Appeal against sentence.

The appellant was convicted at Bridgend Magistrates' Court on August 16, 1956, of larceny of a pedal cycle and attempted false pretences. He was committed for sentence, under section 29 of the Magistrates' Courts Act, 1952, to Glamorgan County Sessions Appeal Committee who, on September 26, 1956, sentenced him to eight years' preventive detention.

The statutory notice under section 23 of the Criminal Justice Act, 1948, which was served on the appellant stated that it was intended to prove: "Convictions and sentences as follows:—Glamorgan Assizes in 1951, larceny—four cases of stealing pedal cycles. Larceny of tools. Seven years' preventive detention."

Eric B. McLellan, for the appellant.

This appeal raises a purely technical point on the adequacy of a notice served on the appellant before sentence of preventive detention in purported performance of the provisions of section 23 of the Criminal Justice Act, 1948. The notice was defective in that it specified only one previous conviction and sentence (of preventive detention in 1951). Section 21 (2) (*b*) stipulates that before a prisoner is qualified for preventive detention three previous convictions are necessary and section 23 (1) makes it clear that no account shall be taken of any previous conviction not specified in the notice required by that subsection to be served. The three previous convictions must, therefore, appear on the notice. The confusion arises from the provisions of section 23 (2), which provides that proof of a previous sentence of preventive detention shall be proof of the qualifying convictions. This subsection does not in any way vary the form of notice; it affects only the form of proof, if any of the convictions are disputed. The form of notice remains governed by section 21 (2) (*b*), and section 23 (1) and must set out all the convictions necessary to fulfil its terms. If this argument is correct, any order under section 22 would also be bad, as that also would depend on a proper form of notice.

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Ithel Davies, for the Crown.

The practice of specifying one conviction in cases such as those of the present case has been widely followed, but its propriety must depend on the meaning of the words "for the purposes of this section" in section 23 (2). If the subsection relates to matters of evidence only and not to the form of notice, it is conceded that the notice in the present case is invalid.

THE LORD CHIEF JUSTICE: The appellant was convicted before the Bridgend Magistrates' Court of the larceny of a pedal cycle which he had stolen from a workmate and of attempted false pretences. He was committed for sentence to Glamorgan Quarter Sessions because he had twenty or twenty-one previous convictions, including convictions for cycle stealing, and he is obviously an habitual criminal. He had already been sentenced to a term of seven years' preventive detention in 1951. He got some remission, and was released on March 31, 1956. He worked for some time at a smelting works, and was then dismissed for persistent absenteeism. On August 3, he got work as a goods porter on the railway, and worked quite well for eight days, but he then stole a bicycle from the mess room of the goods yard and tried to sell it to two boys, who had the good sense to tell the police, and he was arrested. It is obvious that he is one of those men who is no sooner out of prison than he commits another crime and has to be sentenced again.

Notice was given to him under section 23 of the Criminal Justice Act, 1948, that it was intended to prove at his trial: "Convictions and sentences as follows:—Glamorgan Assizes in 1951, larceny—four cases of stealing pedal cycles. Larceny of tools. Seven years' preventive detention." The appellant himself, who seems to know the provisions of the Criminal Justice Act, has taken the point that he was not liable to be sent to preventive detention because the provisions of section 23 have not been properly carried out. It is a point of the highest technicality, but one to which the court, unfortunately,

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feels bound to give effect. There is a *casus omissus* in the Act which has not been appreciated, and we think that the point taken by the appellant is a good point.

Section 21, which is the section that allows a court to impose a sentence of preventive detention, provides: " (2) Where a person who is not less than thirty years of age—(*a*) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (*b*) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training; then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of preventive detention for such term of not less than five nor more than fourteen years as the court may determine." It will be observed that the requirements are that he should have been convicted on at least three previous occasions, and on two of them sentenced to Borstal training, imprisonment or corrective training. There is no provision that he should have on a previous occasion been sentenced to preventive detention or, for the matter of that, corrective training, because the point we are about to decide will affect not only sentences of preventive detention but also sentences of corrective training and supervision orders under section 22.

Then we turn to section 23. There it is provided: (1) " For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to the provisions of the last foregoing section "—that is a supervision order—" no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it

is intended to prove the conviction or sentence; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury. (2) For the purposes of this section, evidence that a person has previously been sentenced to corrective training or preventive detention shall be evidence of the convictions and sentences which rendered him liable to that sentence." There is nothing there which says that notice may be given to a prisoner that he has previously been sentenced to preventive detention and leave it at that, or that if once it is proved that he has been sentenced to preventive detention then it is not necessary to go any further or prove any previous convictions. Supposing the prisoner disputes the fact that he has been previously convicted, once it is proved that he has been sentenced to preventive detention, it is unnecessary to give any further evidence of previous convictions, because the sentence of preventive detention will prove the previous convictions. Unfortunately, however, the section does not say that notice of a previous conviction which resulted in preventive detention is all that is required. Notice has to be given of three previous convictions, two of which were followed by sentences of Borstal training, imprisonment or corrective training. The police in this case—and no one is blaming them, because the point had never occurred to anybody before—thought, not unnaturally, that if they gave notice that the appellant had been previously sentenced to preventive detention, that was all they need do. We have to hold in this case, most unfortunately, that the notice is a defective notice. It is defective in not giving notice of three previous convictions two of which were followed by sentences of Borstal training, imprisonment or corrective training. Therefore, the sentence cannot stand. We are going to alter the sentence to one of imprisonment, but we cannot even make a supervision order because, again, for the purpose of a supervision order notice has to be given specifying two previous convictions All that we can do is to set aside the sentence of preventive detention, and to vary

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sentence to one of imprisonment for eight years. The appellant gets some advantage, because, if he behaves himself in prison, he will get a longer period of remission than in the case of preventive detention. We hope that the attention of the Home Office will be called to this matter so that, if possible, an amending section can be passed to remove the difficulty. Meanwhile, police authorities must be warned that it is not sufficient to give notice in the case of a prisoner qualified for preventive detention that he has previously had a sentence of preventive detention, but the previous convictions and sentences must be set out.

Sentence varied.

Solicitor: W. Rosin, Bridgend, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE PEARSON

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Nov. 19

ROBIN DAVID TAYLOR

Sentence—Borstal Training—Report of Prison Commissioners.

Sentence of Borstal training affirmed in an exceptional case, despite the fact that the Prison Commissioners had not recommended the appellant as suitable for Borstal.

Appeal against sentence.

The appellant, who had previously been placed on probation at Poole Quarter Sessions pleaded guilty in July, 1956, to taking and driving away a motor-car without the consent of the owner. He was placed under a common law recognisance, and subsequently committed a similar offence. At Poole Quarter Sessions on September 26, 1956, he was sentenced

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Goddard L.C.J., Hallett J., Pearson J.

in respect of the original offence by the Recorder (M. McGougan, Esq.) to Borstal training.

The Prison Commissioners had not recommended the applicant, in their report, as suitable for Borstal training. In the report which the Recorder made to the Court of Criminal Appeal he stated that he believed the Prison Commissioners had not seen certain reports on the appellant.

H. A. Samuels, for the appellant. A sentence of Borstal training was not appropriate in view of the terms of the Prison Commissioners' report.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: If ever there was a case for Borstal training, I should think this is the one. Gorman J. gave leave to appeal, because he thought that the full court had better consider the matter, as the Prison Commissioners had not recommended Borstal training. The learned Recorder has sent a very clear report to the court on the reasons why he thought Borstal training should be imposed. We have to remember that section 17 (2) of the Criminal Justice Act, 1948, directs a court not to send young persons under twenty-one to prison unless there is no other way of dealing with them. The appellant has been placed on probation and has been bound over. In July, 1956, he was put under a common law recognisance for taking and driving away a motor-car belonging to his father, who will not have any more to do with him. He broke his recognisance by doing exactly the same thing again, taking a car out of a garage and driving it when he had no insurance, so that, if he had met with an accident, the unfortunate victims would not have been able to recover any damages. He managed to bog the car down somewhere near Newbury, with the result that it cost the owner £40 to repair it.

The appellant asks us to say that he is to be let off, but we are not going to let him off. We think that the learned Recorder was quite right to disregard the opinion of the

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Prison Commissioners if, as he says, he thought that they had not seen previous reports on the appellant. We think that it is high time that the appellant is placed somewhere where he will get some discipline. The appeal is dismissed.

Appeal dismissed.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE PEARSON

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BERTIE MAHONEY

Desertion—Documents Proving Absence and Arrest—Inference from Length of Absence—Certificate of Arrest—Statement that Accused was then Wearing Civilian Clothes—Inadmissibility of Statement in Certificate—No Substantial Miscarriage of Justice—Army Act, s. 163 (1) (*g*) (*h*) (*jj*)*—Courts-Martial (Appeals) Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 46), *s.* 5 (1).

The appellant was convicted of desertion from his unit from October 9, 1955, to April 13, 1956. To prove the charge the prosecution called a non-commissioned officer who produced (i) a certified true copy of a duly signed record of the finding of a regimental court of inquiry held on October 31, 1955, which stated that the appellant was absent without leave from October 9 to October 31, and was still absent at the date of the inquiry and (ii) a certificate of arrest signed by an officer of the Royal Military Police, which certified that the appellant was arrested at Midhurst on April 13, 1956, and at the time of arrest was wearing civilian clothes. The appellant gave no evidence explaining his absence. No objection to the inclusion of the statement with regard to civilian clothes was taken either at the trial or in the notice of appeal.

Held, (i) that the copy of the record of the court of inquiry was evidence that the appellant was absent from October 9 to October 31, 1955, that the certificate of arrest was evidence

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of his arrest on April 13, 1956, and that the court could, therefore, properly draw the inference that he was absent between October 31, 1955, and April 13, 1956, and unexplained absence for so long a period was evidence that he did not intend to return;

(ii) that, though oral evidence that the appellant was wearing civilian clothes at the time of his arrest could properly have been given before the court-martial, under the Army Act, s. 163 (1) (*jj*), the certificate of arrest was evidence only of the fact, date and place of arrest, and that, accordingly, the statement that the appellant was wearing civilian clothes at the time of his arrest had been improperly included, and the certificate wrongly treated as evidence of that fact; but that, no substantial miscarriage of justice having occurred, the proviso to s. 5 (1) of the Courts-Martial (Appeals) Act, 1951, should be applied and the appeal should be dismissed.

Disapproval of the passage in the Manual of Military Law (1951 ed., p. 383, footnote 17), which reads "A statement in the certificate of surrender to the effect that the man was wearing civilian clothes is admissible as part of the fact of surrender or apprehension."

Appeal against conviction.

The appellant, Pte. Bertie Mahoney of the Middlesex Regiment, was convicted before a district court-martial on a charge of desertion from October 9, 1955, to April 13, 1956, and was sentenced to nine months' imprisonment. At the conclusion of the case for the prosecution counsel for the appellant submitted that there was no case to answer because the appellant was entitled to release on October 2, 1955, having enlisted on a regular engagement for five years on October 2, 1950. That submission was overruled. The appellant did not give evidence or call any witnesses. One witness only had been called for the prosecution, a non-commissioned officer, who produced (a) a certified true copy of a duly signed record of the finding of a regimental court of inquiry held on October 31, 1955, which stated that the appellant was absent without leave from October 9, 1955, and was still absent at the date of the inquiry, and (b) a certificate of arrest signed by an officer of the Royal Military Police, which certified that the appellant was arrested at Midhurst on April 13, 1956, and at the time of arrest was

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wearing civilian clothes. The witness also produced an extract from Part II orders of the unit dated August 22, 1955, stating that the appellant was posted to the depot with a view to discharge, and a further extract from Part II orders, dated the following day, cancelling the appellant's posting.

W. R. Rees-Davies for the appellant.
E. Garth Moore for the Crown.

THE LORD CHIEF JUSTICE: The appellant was found guilty by a court-martial of desertion. He obtained leave to appeal to this Court because our attention at the time—and I am not blaming anybody—was not called to the provisions of section 163 of the Army Act, which makes certain documents evidence. In this case, the only evidence—which would not be evidence in a civil court—called before the court-martial was the evidence of a corporal who apparently was detailed to produce some documents. He produced documents which show that a court of inquiry had been held in respect of the appellant's absence from his unit, and that the court of inquiry had found that he was absent from October 9, 1955, to the day when the court of inquiry was held, October 31, 1955. Another document was also put in which showed that the appellant was arrested at Midhurst, his unit being at Mill Hill. That document stated: "I certify that the accused of the Middlesex Regiment was arrested at Midhurst, Sussex, at 19.45 hours on April 13, 1956, and at the time of his arrest was wearing civilian clothes."

Section 163 (1) of the Army Act, provides: "(*g*) Where a record is made in one of the service books in pursuance of any Act or of the King's Regulations, or otherwise in pursuance of military duty, and purports to be signed by the commanding officer or by the officer or record officer whose duty it is to make such record, such record shall be evidence of the facts thereby stated. (*h*) A copy of any record in one of the said service books purporting to be certified a true copy by the officer or record officer having the custody of such book shall be evidence of such record." Then it is provided in para. (*jj*):

"Where the proceedings are proceedings against an officer or soldier on a charge of being a deserter or absentee without leave, and the officer or soldier has been apprehended and has on arrest been taken into the custody of a provost marshal, assistant provost marshal or other officer, a certificate purporting to have been signed by such provost marshal, assistant provost marshal or other officer . . . and stating the fact, date and place of arrest . . . shall be evidence of the matters so stated." Therefore, this finding of the court of inquiry was quite properly admitted, and I do not think Mr. Rees-Davies, who has endeavoured to take every point that could be taken, has disputed that it could be admitted as evidence of what the court of inquiry found.

The court-martial, therefore, had before them evidence that the appellant was absent from his unit from October 9 to October 31. They also had evidence that he was arrested on April 13. Mr. Rees-Davies with some courage has asked the court to say that on those facts the court-martial were not justified in drawing the inference that he was absent from his unit from the day when the absence began, October 9, till his arrest. I can only say that I cannot agree to that. It seems to me that where a man is found to be absent without leave from October 9 to October 31, and has then to be arrested and is not arrested till April 13, the inference is that he has been absent from his unit the whole of that time. If a man is absent from October 9 to October 31, I should say that that is ample time for a court-martial to hold that he did not intend to return. Why he did not intend to return has to be explained by him. No explanation being given, there was ample evidence here on which the court-martial could hold that the appellant was absent from his unit from October 9, 1955, till his arrest on April 13, 1956, and therefore there was ample evidence that he had been absent for such a long time that, in the absence of any explanation by him, he intended to desert Her Majesty's Forces.

The whole argument addressed to the court was that the appellant was entitled to assume that he had not to go back

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to his unit. I need not go into that at any length, because he gave no evidence why he did not return to his unit. Therefore, there was abundant evidence to justify a finding that he intended to desert; but one other point has been taken in this court for the first time. It was never mentioned in the notice of appeal or taken below. The certificate of arrest, which was put in as evidence, does add these words: "At the time of his arrest was wearing civilian clothes." That a man dressed himself as a civilian and not in his uniform might be some evidence of his intending to desert. At any rate, the court cannot say, and Mr. Garth Moore does not contend, that those words "at the time of his arrest was wearing civilian clothes" could properly be inserted in this certificate. They ought not to have been there There is a passage in the Manual of Military Law (1951 ed., at p. 383), which reads: "A statement in the certificate of surrender to the effect that the man was wearing civilian clothes is admissible as part of the fact of the surrender or apprehension." That is wrong; such a statement in the certificate is not evidence, though proof of the matter could be given by verbal evidence. This point was never taken below. The attention of the court-martial was not called to it, I think for the good reason that Mr. Rees-Davies was strenuously arguing that no inference could be drawn from the fact that the appellant was in civilian clothes and, for all I know, the court was in agreement with that because, as he says, nowadays soldiers are allowed to wear civilian clothes much more than they used to be. No objection was taken to the admissibility of the document in which the statement appeared, and the court considers they are obviously justified in applying the proviso to section 5 (1) of the Courts-Martial (Appeals) Act, 1951. Of course the appellant did not intend to return, his contention being that he was not bound to return. That point has not been argued before us. If he had gone into the box and given some explanation about this, it might have had considerable effect in mitigation, but he did

not. There was, therefore, abundant evidence that the appellant was absent from his unit in such circumstances that the court was perfectly entitled to find that he had no intention of returning, and that constitutes the offence of desertion. This appeal is dismissed.

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Appeal dismissed.

Solicitors: Wilders and Sorrell, Hornsey, for the appellant.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ORMEROD

ROBERT ALEXANDER CRAIG LINZEE
GERALD O'DRISCOLL

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Evidence—Corroboration—Assault—Alleged Participant in Assault Called by Prosecution.

Judge-Advocate—Evidence Fit to be Left to Court to Consider—Advice to be Given.

Retirement to Consider Finding—Right to Separate—Question of Right to Adjourn—Communication made to Court when Closed by Deputy Assistant Adjutant-General.

Although on a charge of assault the evidence of the alleged victim does not require corroboration in law or practice, in a case where two officers were charged with assaulting a suspect in their custody, and in addition to the alleged victim, the prosecution called a soldier who had witnessed and was said to have been a participant in the assault,

Held, that it was proper for the Judge-Advocate to regard the soldier as a tainted witness and to warn the court of the desirability of looking for corroboration of his evidence.

The position of a Judge-Advocate with regard to a court-martial is not entirely analogous to that of a judge with regard

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to a jury. If there is no evidence fit to be left to the court, the Judge-Advocate must direct the court to acquit; but though in a case where there is some evidence fit to be left to a jury, a judge may, from time to time, advise the jury that they ought to acquit, a Judge-Advocate should not be expected to take a similar course.

There is no true analogy between a court-martial and a jury or a bench of magistrates. A court-martial is a court *sui generis*, and the old common law rule of jury closure and jury retirement does not apply to it. Though the members of a court-martial may separate after retiring to consider their finding, they must not consult other persons about the case.

Where, however, a court-martial had closed to deliberate on its findings at 5 p.m. on a Saturday evening and proposed to adjourn till 9 a.m. on the following Monday morning, and the President sent for the Deputy Assistant Adjutant-General (who was not a member of the court) and consulted him in private on the position,

Held, there had been no serious breach of the Rules of Procedure or irregularity which would oblige the Courts-Martial Appeal Court to quash the conviction.

Observations on the duties of the Courts-Martial Appeal Court as a Court of Appeal.

Appeals against convictions.

The appellants, Captain Robert Alexander Craig Linzee, of the Gordon Highlanders, and Captain Gerald O'Driscoll, of the Intelligence Corps, were convicted by a general court-martial at Nicosia, Cyprus. Both appellants were charged with (i) assault occasioning actual bodily harm to one Koronides, a Cypriot suspect, while in custody; (ii) assault on another suspect named Constantinou; (iii) conspiracy to pervert the course of public justice. The first appellant was charged further with assault occasioning actual bodily harm to another suspect. Both appellants were convicted of the charge of assault on Constantinou, but the Confirming Officer did not confirm that finding against Captain O'Driscoll; and both appellants were convicted on the charge of conspiracy. On the other charges both appellants were acquitted. Both appellants were sentenced to be cashiered, but in each case the Confirming Officer reduced the sentence to dismissal from the Army.

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David Lloyd and *Julian Byng* for the appellant Linzee.
Peter Lewis for the appellant O'Driscoll.
E. Garth Moore appeared for the Crown.

THE LORD CHIEF JUSTICE: This is an appeal by two officers, one Captain Linzee and the other Captain O'Driscoll, who were convicted before a general court-martial sitting in Cyprus. Captain Linzee was convicted of two offences and Captain O'Driscoll of one. Captain Linzee was convicted of assaulting a prisoner who was in custody and whom he was interrogating. Captain O'Driscoll also was convicted of assaulting that prisoner, but the Confirming Officer did not confirm the finding. They were also both convicted, and in one respect I suppose this is the more serious point, of conspiring among themselves and with others to pervert the course of public justice.

Anybody who has read the papers in this case, and who has read the testimonials which were given to these two officers for their gallantry and good service in the suppression of terrorism in Cyprus, and the number of lives they probably have saved by their efforts, can only approach this case with a feeling that it is a most unhappy business. I think I might say of this court, as I am sure one can say of the court-martial, that they would approach this case with every sympathy with the officers, who, I dare say, on account of the terrible stress to which they had been subject, may have temporarily lost their heads and ill-treated a prisoner, and then, realising what they had done, wished to cover it up. I am sure, therefore, that the court-martial approached this case with every feeling of sympathy for two gallant officers.

I want, however, to point out what are the functions of this court, because I am not sure that persons who are subject to military law and who appeal to this court altogether understand them. We do not try anybody, and cannot. We sit merely as a court of appeal, and as a court of appeal our duty is this: First, we have to see that the finding is one that is possible in law. Then we have to see that there was evidence before the court-martial which supported the finding which

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they gave. Then we have to see, if any question of law arose, whether the law was correctly laid down by the Judge-Advocate, who nowadays I think in every case of a general court-martial, and in most cases of district courts-martial, is a qualified lawyer. We have to see that the summing-up was adequate and, as we have repeatedly said in the Court of Criminal Appeal, the summing-up is adequate if it states fairly the evidence for the prosecution and the nature and evidence of the defence. It is not necessary to go into every point which the defence has raised. It is not necessary to go into the evidence of every witness. The court has to be reminded of the nature of the defence, and it is desirable that they should be reminded in substance, but not in detail, of the evidence given for the defence. It is not our function to re-try the case because we do not see the witnesses, and no court of appeal does re-try a case in the sense of substituting themselves either for a jury in a civil case or for a court-martial in the case of one of the Services.

In this case, what I think would strike anybody is this: There were the two charges on which there were the convictions which I have mentioned, but there were two other charges, which also were charges of assault, and on those charges the court-martial acquitted. They acquitted on charges 1 and 4 and they convicted on charges 2 and 3. Considering the nature of the case and the general nature of the evidence that was given, the general surroundings of assaults on prisoners, and so forth, and corroboration or lack of corroboration, the very fact that the court-martial convicted in two cases and acquitted in two cases seems to me to show that they applied their minds with care to the evidence put before them. I think it is fair to say, though they did not announce the fact, that having gone through the papers, as the members of this court have, that the corroboration or what was said to be corroboration or what was possibly corroboration in regard to counts 1 and 4 was obviously not as strong as it was with regard to count 2. With regard to count 3,

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that stood on a different footing. The court-martial found that these two officers were guilty of assault on one man and not guilty of assault upon another man. I say the "two officers" because the court-martial found the case proved against both, although in the case of O'Driscoll the Confirming Officer did not confirm the finding.

We have had read to us various passages from the summing-up, a summing-up which we have all read with care ourselves, and in this court, sitting both in its capacity as the Court of Criminal Appeal and as the Courts-Martial Appeal Court, it is a very common thing to challenge a summing-up on the ground that there has been misdirection. In this case, the court cannot find misdirection of any sort or kind. We think that the Judge-Advocate gave a summing-up which is quite impeccable. One can find in nearly every judge's summing-up, if one goes through it with a magnifying glass, some sentence of which it can be said: "This is not quite accurate" or "Something else ought to have been said." The fact is that one should not look at summings-up in that way. One must take the summing-up as a whole and see that there is no mis-statement of law; that is the first thing. Certainly there is no mis-statement of law here. One must then in certain cases, where it has become long-standing practice to require certain warnings or directions to be given, see that they have been given, and one of the matters of challenge in this case is with regard to whether or not there was a sufficient direction on corroboration.

The matter of corroboration of evidence is perfectly simple. There are certain—very few—cases in which the law requires corroborative evidence to be given and in which, unless it is forthcoming, there cannot be a conviction, and it would be the duty of the judge or the court-martial, as the case may be, to stop the case. The commonest case is the unsworn evidence of children, The unsworn evidence of a child may, by section 38 of the Children and Young Persons Act, 1933, be taken on any matter, but there is then the provision that that

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evidence must be corroborated by sworn testimony. Then, it is a statutory rule under section 13 of the Perjury Act, 1911, that a charge of perjury cannot be sustained solely on the evidence of one witness. Two witnesses are required in most cases of high treason, and there are other cases in which there is a statutory provision as to corroboration. There are also other cases in which it is so desirable that there should be corroboration that for many years judges have always warned juries, and Judge-Advocates, taking their cue from the judges, continue to warn courts-martial that it is most desirable that they should find corroboration. That is principally so with regard to the evidence of accomplices.

In this case it is said that there was not a warning with regard to corroboration, but this was a curious case. This was not a case in which an accomplice was the principal witness for the prosecution. The person who was assaulted here was the man Constantinou. He gave his evidence and his evidence did not require to be corroborated; there was no requirement either as a rule of practice or of law. If a man comes before a court and says: "This man hit me in the face" or "stabbed me," there is no rule of law that his evidence should be corroborated. A private soldier named Lawrence who is said to have been present and to have taken some part in the assault was called, and the Judge-Advocate did warn the court-martial that that witness's evidence ought to be corroborated, That certainly was a direction which was being given in favour of the prisoners because really what Lawrence was doing was corroborating the complainant's evidence. Speaking for myself, I do not feel at all sure that it was necessary that there should be this warning in this particular class of case. The ordinary case in which corroboration is required, is where an accomplice comes forward and says that the prisoner has committed an offence. The commonest case, which Hilbery J. put, is the case of a man charged with receiving stolen goods. The prosecution call the thief, who says: "I stole the goods and sold them to the

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prisoner." It is desirable that the thief's evidence should be corroborated, as he might be accusing other people in order to secure an indulgence for himself. This is a case in which the witness says: "These two officers assaulted me." Then the prosecution call also a soldier who was there and who was alleged to have taken part in it. It was, therefore, quite right for the Judge-Advocate to warn the court-martial that that witness was to a great extent, if you like, a tainted witness and that, therefore, they should not accept his evidence unless they were thoroughly satisfied with it, and that it would be desirable to find some corroboration; but in fact the soldier was corroborating the complainant. Assuming, therefore, that there was evidence which required to be corroborated, there was ample corroboration here if the court-martial chose to accept it. The duty of the judge or Judge-Advocate is to point out the necessity or desirability, as the case may be, of corroboration, and then having done that, point out to the court what can be corroboration. It is not for him to say whether it does corroborate; that is for the court.

In this case the Judge-Advocate pointed out to the court-martial that the injured man was found by two doctors, a Greek doctor and a doctor of the Royal Army Medical Corps, to have on him chain marks, and he said he had been assaulted by being beaten with a chain. There was a chain in the place where he was interrogated, and it was with that chain he said he was beaten, and there was evidence from the doctors that there were bruises on his body which appeared to have been caused by a chain. That corroborated his evidence if the court-martial accepted it. The court-martial had first to consider whether they could believe the evidence at all, because no kind of corroboration would turn a lie into truth, and in any court when corroboration is being considered the first thing to consider is whether the evidence given by the witness which requires to be corroborated is satisfactory. The question must be asked whether it is evidence which should not be acted upon unless corroborated. Of course, if that evidence is considered to be untrue, no question of corroboration arises, Here the

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court, having heard the evidence, came to the conclusion that there was an assault. We cannot say they were wrong. There was abundant evidence on which they could come to that decision.

On the other charge of conspiracy to pervert the course of public justice, the evidence was this: It was said that it leaked out that there had been this beating-up of Constantinou and the Special Investigation Branch of the Army were making enquiries, and thereupon these two officers went round and interviewed witnesses and tried to induce them to suppress the facts relating to this beating-up, and to leave their names out of any statement they might have given to the officers whose duty it was to collect the evidence and, if necessary, lay it before the Commanding Officer for the purpose of considering whether a court-martial should be held; in other words, they were trying to induce these persons to give false evidence or to omit from their evidence the facts of the assault. The Judge-Advocate not once, but more than once, warned the court-martial of the danger that there might be in this case of acting on uncorroborated evidence, because here the evidence was uncorroborated. Evidence was given for the defence, and when the Judge-Advocate summed up, no one can say that he did not sum up fairly. It is complained that he did not put the matter as strongly to the court-martial as a judge might have done. I do not think it can be put higher than " might have done." The position of the Judge-Advocate is certainly not that of a judge. He has not the authority over a court-martial that a judge has over a court over which he is presiding; and I should not expect a Judge-Advocate to address a court-martial in entirely the same way that a judge may at times address or direct a jury.

The Judge-Advocate's duty is to advise the court-martial on questions of law; and we have heard that, by an amendment which comes into force in January, 1957 [Rules of Procedure (Army), 1956 (S.I. 1956, No. 162) r. 80 (3)] he himself will rule on questions of law; but he will still have to

sum up the facts. From time to time there are cases in which a judge says to a jury: "Although I cannot say that there is no evidence in this case to be left to you as a jury, I tell you that you ought to acquit." If the judge once leaves a case to a jury, which he must do if he thinks there is any evidence to go to the jury, and the jury choose to convict, they have the right to do it. I remember one case in which the learned Recorder of a great city in the North of England strongly urged the jury to acquit, but they convicted. I cannot imagine a Judge-Advocate directing a court-martial to acquit, but a judge can sometimes say to a jury: "I think you ought to acquit." Of course, a judge directs to acquit if there is no evidence, and so would a Judge-Advocate. He would say in such a case: "There is no evidence on which you can convict"; but assuming there is evidence, he can do no more than tender advice to the court-martial. It is said that he did not advise them strongly enough. I do not think we can go into the words used, but I should not expect a Judge-Advocate necessarily to address a court-martial in the same way in a particular case as a judge, exercising his discretion, might direct a jury. It has not been even faintly suggested in this case that there was not evidence on which the court-martial could find this conspiracy proved, and therefore, again, whatever we may think of the evidence, it is impossible for us to interfere.

The last point raised in the case is that it is said that after the court-martial retired to consider their findings in closed court, as it is called, the Deputy Assistant Adjutant-General, one Major Brough, was in communication with them, having been sent for by the President. We have had some rather interesting discussion about the position of a court-martial, and how far it is analogous to a jury. I do not think it is analogous to a jury, and there is no true analogy between a court-martial, a jury or a bench of magistrates. It is a court which is *sui generis*. It is a peculiar court of itself, but it is certainly not a court in which the old common law rule of jury closure and jury retirement would be applied unless there was statutory force to compel one to do so. Of course, they must

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consider their finding in private, and they must consider it without anybody being called in unless the rules of procedure enable them to do it. I certainly should not say that because they separated, that would disqualify or nullify all their further proceedings. A jury is in an entirely different position. Since the earliest days, as soon as a judge has finished his charge to the jury, they are given in charge of the bailiff, who is sworn to keep them in a private place and suffer no-one to speak to them except to ask whether they have agreed upon their verdict without the leave of the judge. A court-martial are not in that position. They are always in a position to consider and pronounce their finding without separating, and no doubt they generally do so, but if they want to separate and go to lunch, as far as I know, there is no reason why they should not, but they must not, no doubt, consult other people about the case. Here it was known, as it was getting late, that some message was sent by the President to the Deputy Assistant Adjutant-General, who would be the Staff Officer of the convening authority, and all we have before us is this note, which was put upon the proceedings: "After the court had closed to deliberate on their findings and at 17.00 hours on April 7, 1956, the President, not in open court and before he could be stopped, told Judge-Advocate that he was proposing to adjourn the court until 09.00 hours on April 9, 1956"—that is certainly not a matter which this court would hold would interfere with the proceedings—"that is, following Monday morning when the court would recommence their deliberations on the findings. He was told that this was improper and he must re-open the court where the matter could be fully discussed. Major Brough, D.A.A.G., H.Q., Cyprus, for whom the President had sent, subsequently took this message in to him and came back and reported that the President had withdrawn his proposal and the court would then resume their deliberations on the findings." Whether Major Brough had gone into the room before he was sent in by the Judge-Advocate with that direction, we are left in doubt, or whether he had been into the room on the occasion when the Judge-Advocate

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told him to go in to tell the President he could not adjourn, I do not know. But if it is suggested or thought that there had been any sort of suspicion that anything which might be unfair to the accused officers had been done, surely it should have been raised at the time and enquiry could have been made as to why Major Brough went into the room; and it is not to be left to this court from an ambiguous note of this sort to conclude that there was some serious breach of the rules of procedure or something so irregular that this court would be obliged to find that it invalidated the whole proceedings. It seems to me, on a fair reading of this note, that it really means this: The President had sent for Major Brough, who was the Deputy Assistant Adjutant-General in charge of all the arrangements for holding the court-martial. It appears from this note that it was simply on the question, whether the court-martial had to give their decision that night or whether it was proper for them to adjourn over the week-end. The Judge-Advocate found that this was going on, and he sent a message by Major Brough to the President to say that that was improper. The court cannot possibly say on anything in this note that they would be obliged to quash the conviction.

For the reasons I have endeavoured to state, however lamentable this matter may be, and however much one may sympathise with these gallant officers who committed a serious crime of which their fellows take a serious view, this court can only dismiss the appeals.

Appeals dismissed.

Solicitors: Lomer and Wheater, for the first appellant.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ORMEROD

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CHARLES VICTOR CARR

Corruption—Inducement to Show Favour—No Necessity to Prove Favour Actually Shown—Prevention of Corruption Act, 1906 (6 *Edw.* 7, *c.* 34), *s.* 1 (1).

On a charge of receiving a bribe contrary to section 1 (1) of the Prevention of Corruption Act, 1906, the prosecution have merely to prove that the accused person did receive a bribe as an inducement to show favour; they are not required to prove that he did actually show favour in consequence of having received the bribe.

Application for leave to appeal against conviction.

The applicant, Charles Victor Carr, a major in the Royal Engineers, was convicted by a general court-martial at Aqaba, Jordan, of committing a civil offence, namely, corruption contrary to the provisions of section 1 (1) of the Prevention of Corruption Act, 1906.

The Judge-Advocate directed the court that they must be satisfied not only that the applicant received a bribe as an inducement to show favour, but also that he did show favour to the persons from whom he received the bribe.

David Lloyd and *Julian Byng* for the applicant.
E. Garth Moore for the Crown.

THE LORD CHIEF JUSTICE: Leave to appeal will not be given in this case, but I must say one word for the guidance of prosecuting officers and Judge-Advocates.

The appellant was charged in this case with taking a bribe, an offence against the Prevention of Corruption Act, 1906.

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The learned Judge-Advocate told the court-martial that they must not only be satisfied that he received a bribe as an inducement to show favour, but also that he did show favour. That is not so; the bribe was given to him as an inducement to show favour. It does not matter if he did show favour. If the person did what is called "double-crossing," and did not do what he was bribed for, that is no reason why he should be acquitted of taking a bribe. Of course, if he takes a bribe and goes straight off to a person in authority and says: "Here is the bribe which has been given me," that would generally show that he is not acting corruptly. In this case there was quite a wrong direction, but it was given in favour of the prisoner, not against him. I have merely said what I have said because, if there is an idea that in such an offence it is necessary to show that the person did that which the bribe was given to him to do, it is an impression that should be corrected.

Application refused.

Solicitors: Lomer and Wheater for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SLADE

THOMAS EWART FLOWER

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Previous Convictions of Prisoner—Indictment Containing Averment—Indictment Shown to Jury—Conviction Quashed.

Road Traffic—Taking and Driving Car without Consent of Owner—Desirability of Adding Charge of Stealing Petrol.

Where previous convictions of a prisoner appear on the indictment, care must be taken to see that the actual indictment is not handed to the jury.

Observations on the desirability, on charges of taking and

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driving away a motor-vehicle without the owner's consent, of adding a charge of stealing the petrol in the vehicle.

Appeal against conviction.

The appellant was convicted at Buckinghamshire Quarter Sessions on October 30, 1956, of taking and driving away a motor-car without the consent of the owner or other lawful authority and was sentenced by the Deputy-Chairman (Aubrey Fletcher, Esq.) to eight months' imprisonment.

Previous convictions of the appellant qualifying him for corrective training appeared on the back of the indictment, which was handed to the jury when they retired.

Julian Byng, for the appellant:

The jury, at any rate, had the opportunity of seeing the previous convictions of the appellant which appeared on the back of the indictment and the position is the same as if they had been disclosed in open court or the appellant had been cross-examined with regard to them. The fact that the jury acquitted on the first and third counts shows that they must have felt some difficulty with regard to the case and the information with regard to the previous convictions may well have turned the scales against the appellant.

John Lawrence, for the Crown:

It is not clear whether the jury did actually see the convictions, but it is conceded that it is most unfortunate that they should have been given the opportunity of doing so. All the issues in the case were very carefully explained, and the appellant's defence very fully put, by the Deputy-Chairman in the course of his summing-up, and in the circumstances the court is asked to consider whether the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should not be applied.

THE LORD CHIEF JUSTICE: The appellant was indicted on three counts. The first count charged him with breaking and entering a garage at Stoke Poges between 10 p.m. on June 15 and 7 a.m. on June 16, 1956, in the county of Buckingham,

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and stealing therein a Jaguar motor-car, the property of Norman Leslie Stephen Hay. In the second count he was charged with taking and driving away the car between the same times, in the county of Buckingham, without the consent of the owner or other lawful authority. Thirdly he was charged with receiving the car in the county of Essex on a day unknown between June 14 and 18, knowing the same to have been stolen. The jury acquitted on the first and third counts and convicted on the second count.

One of the grounds of appeal is that by one of those mishaps to which this court is not going to attach great blame—but it must not happen again—his previous convictions, which were going to be put to the appellant if the court wished to sentence him to corrective training, appeared on the back of the indictment. No doubt that is a convenient practice, but if previous convictions are put on the back of the indictment, care has to be taken to see that the indictment is not handed to the jury.

In the present case when the jury retired they were given the indictment and we cannot say that they did not see the convictions on the back, and counsel for the appellant is entitled to say that the position is the same as if the appellant had been cross-examined about his previous convictions.

The learned Deputy-Chairman summed up this case with very great care. If a garage is broken into and a motor-car taken out of it, most laymen would say that the felony of breaking and entering and stealing had been committed. But with regard to motor-cars, it being recognised that they are difficult to dispose of, there has been created a statutory offence of taking and driving away a motor-car without the owner's consent or other lawful authority. Stealing invokes the intent of permanently depriving the owner of the property, and if magistrates or a jury think that all the offender intended to do was to take the car for the purpose of having a ride, or for the purpose of committing a crime and using the car as a means of escape and then leaving it to be found and returned by the police, that is not stealing. I have often wondered, and

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the longer I sit here the more I wonder why, just because the offence was established by section 28 (1) of the Road Traffic Act, 1930, the practice of charging the offender with stealing petrol is not followed. If the charge in this case had been one of stealing petrol, there would have been no difficulty. The appellant would have had no defence and he would have been liable to five years' imprisonment. I hope that the police and those responsible for prosecutions will remember that it is still open to charge an offender with stealing petrol in such circumstances.

The Deputy-Chairman, in the course of his very careful summing-up, explained this to the jury and pointed out to them another thing which laymen often do not understand, that it is no criminal offence to break into a house or building unless it is done with the intention of committing a felony. I remember that in the first case in which I ever prosecuted the prisoner was charged with breaking into a brewery in North Wiltshire with intent to commit a felony. Phillimore J. pointed out to the jury that the prisoner had only gone into the premises to have a sleep and that therefore they ought to acquit him, and he was acquitted. When I have tried such cases at assizes, I have directed juries to acquit or certainly to consider very carefully whether they should not acquit, because it might be that the prisoner had gone into the premises to get out of the rain or the cold and not for the purpose of committing a felony.

The jury in the present case in acquitting on the first count, probably because of the way the case was presented, fought, tried, and summed-up, were not satisfied that the appellant broke into the garage with the intention of stealing the car as opposed simply with taking it without consent. The car was seen on the Saturday at Southend. On the Sunday the appellant was seen to get into the car with a young woman, and he said that he had taken the car for the week-end without the "governor's" consent. He also put forward the defence of an alibi in respect of the first count, but it was not a very good one.

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The jury more probably acquitted him on that count because they did not think that the appellant broke into the garage with intent to steal the car, but only to take it and drive it away without the consent of the owner. In respect of the second count the appellant's defence throughout was that of alibi. He said that on the night of June 15–16 he was never out of Stoke Poges and that he had borrowed the car at Southend. If the evidence was that he borrowed it at Southend, I have difficulty in seeing how he could have been tried at Buckinghamshire Quarter Sessions for that offence.

We cannot say whether the jury looked at the back of the indictment and knew of the previous convictions, but we must assume that they did and that may have caused the scale to come down against the appellant.

The court has come to the conclusion, with considerable reluctance in the present case, although they are quite sure that there was no miscarriage of justice, and the appellant richly deserved to be sent to prison, that it would be safer to quash the conviction, as the jury had improper information although it was given them *per incuriam*. It may be that the appellant is still liable to be charged with the offence in Southend, because if he were charged he would probably not be able to plead *autrefois acquit*. That is a matter for the prosecution; the court only throws out the suggestion that he is probably still liable to be prosecuted. On the whole we think that it would be safer in the interests of the law to quash the conviction.

Conviction quashed.

Solicitors: Harris and Cartwright, Slough, for the Crown.

[COURTS-MARTIAL APPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SLADE

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HERBERT NICHOLSON

Fraudulent Misapplication—"Service Property"—Sergeants' Mess Money—Army Act, ss. 17, 190 (*as amended*).

The expression "service property" in section 17 of the Army Act includes the property of a sergeants' or other service mess. A person subject to military law, therefore, who fraudulently misapplies any property of such a mess is guilty of an offence against the section.

Appeal against conviction.

The appellant, former Bombardier (Acting Sergeant) Herbert Nicholson, was convicted by a district court-martial at Hilden, Germany, on five charges of fraudulently misapplying service property when concerned in the care thereof, contrary to section 17 of the Army Act. He was sentenced to be reduced to the ranks and to undergo nine months' detention.

It was alleged that the appellant, when stationed at Hilden, where he was employed as caterer in a warrant officers' and sergeants' mess, fraudulently misapplied various sums of money, the property of the mess.

Peter Lewis for the appellant.
E. Garth Moore for the Crown.

SLADE J.: This is an appeal by Bombardier (Acting Sergeant) H. Nicholson, who was tried by district court-martial at Hilden on a charge sheet containing twelve charges. Five of the charges were framed under section 17 of the Army Act, namely, Nos. 3, 4, 6, 7 and 9, six under section 18 (4), and the last one under section 41. He was acquitted of the charge under section 41 and of all the charges under section 18 (4)

and was convicted of five charges, namely, 3, 4, 6, 7 and 9 under section 17. The charges are in the same or substantially the same words, and I need read only one of them. The third charge charged the appellant: "when concerned in the care of service property fraudulently misapplying the same, in that he at Hilden on or about April 25, 1956, when as caterer of the warrant officers' and sergeants' mess, Headquarters Company, 2nd Infantry Division, he was concerned in the care of service property, that is to say, the bar takings of the said mess, fraudulently misapplied the sum of £12 4s. 1d. part thereof."

The only substantial ground of this appeal is a pure point of law. It is alleged that the Judge-Advocate was wrong in law in advising the court-martial that the expression "service property" in section 17 could include the property of a service mess. When a person who is subject to military law commits the offence *inter alia* of fraudulent misapplication or fraudulent conversion, it is possible, if the circumstances warrant it, that he may be charged under one of three sections of the Army Act. He may be charged with having committed the civil offence of fraudulent conversion under section 41. He may be charged under section 18 (4), as indeed the appellant was in this case on some of the other charges, or he may be charged under section 17. Under section 18 (4) any person subject to military law commits an offence if he "steals, embezzles or fraudulently misapplies or receives, knowing it to have been stolen or embezzled, any property belonging to a person subject to military law, or belonging to any service mess or band or to any service institution, or to the Navy, Army and Air Force Institutes, or any public property." The only requirements of that subsection are that he shall be a person subject to military law and his offence should relate to one of the matters set out in subsection (4). It is not necesssary that he should occupy any fiduciary position in relation to the property alleged to have been stolen, embezzled or as the case may be.

Section 17 deals with persons subject to military law who commit, *inter alia*, the offence of fraudulent misapplication while

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occupying a position of trust. Section 17 provides: "Every person subject to military law who commits any of the following offences; that is to say, being charged with or concerned in the care or distribution of any public or service property, steals, fraudulently misapplies, or embezzles the same, or is concerned in or connives at the stealing," etc., "shall, on conviction by court-martial" receive a higher punishment than he can receive under section 18 (4).

The term "service property" is defined by section 190 of the Act * in these terms: "'service' when qualifying institution"—that is to say, as I understand it, when used as an adjective—"necessaries, books, band, mess or property means" —these are the important words—"belonging to, or connected with Her Majesty's military forces (other than Dominion forces) or any body of Her Majesty's military forces (other than Dominion forces)." It seems, therefore, that the only question this court has to decide is whether the property of a warrant officers' and sergeants' mess comes within the words "property connected with Her Majesty's military forces . . . or any body of Her Majesty's military forces." In the opinion of this court the term is amply wide enough to cover the property of a warrant officers' and sergeants' mess, and therefore this appeal fails on that ground.

I am not certain that I quite followed the complaint upon the other ground when exception was taken to a single passage in the direction given by the Judge-Advocate to the court when he was directing the court in relation to charge 10, which was one of the charges on which the appellant was acquitted; but it is sufficient to say that this court can see no misdirection in that direction or anything to which exception can be taken nor was leave to appeal given on that ground. In the circumstances, the appeal is dismissed.

Appeal dismissed.

* The section appears as amended by the Army and Air Force (Annual) Act, 1951, s. 7 (1) (*a*) (*b*). The definition of "service" was substituted for that of "regimental" formerly defined in section 190 (17) of the Army Act, by section 7 (4) of the Act of 1951, and the definitions in section 190 were arranged in alphabetical order by section 15 (1) (*b*) of the Army and Air Force (Annual) Act, 1952.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ORMEROD

Re SHIPTON

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Dec. 17

Manslaughter—Only Count in Indictment—Acquittal—Statement by Jury that they were not Agreed on Dangerous Driving—Direction of Judge that Issue be tried at Quarter Sessions—Refusal of Recorder to Accept Jurisdiction—Mandamus—Trial Brought to "Final Conclusion"—Criminal Justice Act, 1925 (14 & 15 *Geo.* 5, *c.* 86), *s.* 14 (2).

Where an indictment contained a count for manslaughter only, and a jury at assizes returned a verdict of Not Guilty of manslaughter but were unable to agree on a verdict with regard to dangerous driving, and the judge directed that that issue be tried at quarter sessions, but the Recorder took the view that he had no jurisdiction to try it, as the indictment was for manslaughter only,

Held, that the Recorder was right in declining jurisdiction.

Application for leave to apply for order of mandamus.

On October 12, 1956, William George Shipton (hereinafter referred to as "the defendant") was charged at Dorset Assizes before Havers J. with manslaughter arising out of the driving of a motor-car on August 20. The indictment contained a count for manslaughter only. The jury returned a verdict of Not Guilty of manslaughter, but volunteered the information that they were not agreed on the issue of dangerous driving, which the judge had directed them was a verdict open to them on the indictment. Havers J. then discharged the jury and directed that the issue of dangerous driving be tried at Bournemouth Quarter Sessions. Counsel for the prosecution applied for leave to prefer a bill of indictment, under section 2 (2) (*b*) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, but leave was refused.

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On October 18, 1956, the defendant appeared at Bournemouth Quarter Sessions, but the Recorder (N. R. Fox-Andrews, Esq.) took the view that he had no jurisdiction to try the defendant, inasmuch as the only indictment before him was an indictment for manslaughter, an offence which was not triable at quarter sessions. The Director of Public Prosecutions applied to the Divisional Court for leave to apply for an order of mandamus directing the Recorder to try the issue of dangerous driving.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) (*Rodger Winn* with him) for the applicant. At the trial at assizes the issue of dangerous driving, which was before the jury, was left undetermined. The judge must have proceeded on the basis that section 14 (2) of the Criminal Justice Act, 1925, applied, that the trial was not brought " to a final conclusion before the court " within the meaning of the subsection and that he had, accordingly, power to direct the re-trial of that issue at any court competent to try such a charge. The court is, however, faced with the difficult question, whether the indictment for manslaughter had been concluded by the verdict on it of Not Guilty of manslaughter.

[THE LORD CHIEF JUSTICE. How could the defendant have been arraigned?] In some courts where there has been a disagreement with regard to the lesser offence, the lesser offence has been tried as a separate issue in the same court, but I cannot say how the defendant has been arraigned in such cases. [HILBERY J. Could not the defendant have pleaded *autrefois acquit*?] It would have been difficult for the defendant to point to a verdict disposing of the matter of which he was in jeopardy at quarter sessions.

THE LORD CHIEF JUSTICE: The Solicitor-General applies for leave to move for mandamus directed to the learned Recorder of Bournemouth, because he wants an expression of opinion from the court whether or not the Recorder was right in holding that he had no jurisdiction to try an indictment before him.

The circumstances are that the proposed defendant in the case was a man who had been indicted for motor manslaughter, as it is generally called, before Havers J. at the Dorset Assizes. He was acquitted of manslaughter and then the jury were asked what their verdict was with regard to dangerous driving and they said they were unable to agree. Thereupon, Havers J. ordered the issue of dangerous driving to be tried at the quarter sessions for the borough of Bournemouth, dangerous driving being a matter within the jurisdiction of quarter sessions. When the case came before the learned Recorder at Bournemouth, he saw that the indictment was an indictment for manslaughter, and he said: "I have no jurisdiction to try this case." He refused to try it and, accordingly, the matter now comes before this court on an application for leave to move for mandamus directing him to try the issue of dangerous driving.

Section 34 of the Road Traffic Act, 1934 provides: "Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor-vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section 11 of the principal Act [the Road Traffic Act, 1930] (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of section 21 of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence." That is an entirely permissive section. It says that when the jury have a prisoner in charge on manslaughter, if they come to the conclusion that he is not guilty of manslaughter, they may return a verdict of Guilty of dangerous driving. One knows that they very often do; in fact they surprisingly often find the defendant Not Guilty of manslaughter but Guilty of the lesser offence. In this case they have found him Not Guilty of manslaughter and they have not agreed upon a verdict of Guilty of dangerous driving. There was no separate count for dangerous driving. The section simply says that a jury may return a verdict of Guilty of dangerous driving. The fact is that the jury have said: "We do not find him

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guilty of manslaughter and we do not find him guilty of dangerous driving, because we do not agree on that." I think, with all respect to the learned judge, that the Recorder of Bournemouth took a proper view. He had no jurisdiction to try an indictment which was an indictment for manslaughter. It might be desirable if this matter was cleared up in some way by legislation. The learned judge more than once, when an application was made to allow a voluntary bill for dangerous driving to be preferred, referred to the case of wounding with intent. We all know that on a charge of wounding with intent it is open to a jury to return a verdict of guilty of malicious wounding. In the opinion of the court, exactly the same position arises there as it does here. If a jury find a defendant not guilty of the offence of wounding with intent charged in the indictment and do not go on to say "but we find him guilty of malicious wounding," there is an end of the matter. Perhaps it is a pity the learned judge did not give leave to prefer a voluntary bill. If a voluntary bill had been preferred, whether the defendant would have been able to plead *autrefois acquit* or not I do not know. At any rate, the learned judge did not give leave to prefer a voluntary bill. There was no count for dangerous driving in the indictment, and there have been expressions of this court that another count should never be joined in an indictment for manslaughter. If it were not for the Road Traffic Act, 1956, which has just come into force and which makes a considerable difference by providing a separate offence in section 8 of causing death by reckless or dangerous driving, I should have liked to consider those cases; but, as it is, I think it is perfectly clear, and the Solicitor-General has not been able to show us any authority to the contrary, that the present position is that, as the jury acquitted of manslaughter and did not see fit to return a verdict of dangerous driving there was an end to the case and the Recorder had no jurisdiction to try the indictment, and therefore the court refuses leave to apply for mandamus.

Application refused.

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